Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
a federally-recognized Indian Tribe
and BILLY CYPRESS,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Were the Petitioners, the Miccosukee Tribe of Indians of Florida and Chairman Billy Cypress, entitled to discovery prior to summary judgment where their complaint alleged violations of constitutional rights and violations of the Indian Trust Doctrine and where the allegations did not involve individual capacity claims for damages against officials; and was the affirmance by the Eleventh Circuit of the summary judgment by the district court, prior to discovery, improper under Supreme Court law, including *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584 (1998), and other precedent?

2. Even if the recent Supreme Court case of *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584 (1998), created a new pleading standard for constitutional claims not involving individual capacity suits for damages, was the Eleventh Circuit required to remand the case to the trial court to afford the Petitioners the opportunity to amend their complaint since the *Crawford-El* case was decided after the case at bar was on appeal?

PARTIES TO THE PROCEEDING

1. Miccosukee Tribe of Indians of Florida and Billy Cypress (Plaintiffs/Appellants/Petitioners)

2. The United States of America and United States Department of the Interior, United States Army Corps of Engineers, South Florida Water Management District (Defendants/Appellees/Respondents)

STATEMENT PURSUANT TO RULE 29.6

The Miccosukee Tribe of Indians of Florida is a federally-recognized Indian Tribe whose Business Council Members are Billy Cypress, Chairman, Jasper Nelson, Ass't. Chairman, Max Billie, Treasurer, Andrew Bert, Sr., Secretary and Jerry Cypress, Lawmaker.

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Petitioner, the Miccosukee Tribe of Indians of Florida and its Chairman, Billy Cypress (collectively "Tribe") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals in this case

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Eleventh Circuit is unpublished. Its disposition appears at *Miccosukee Tribe v. United States*, 163 F.3d 1359 (11th Cir. (Fla.) November 19, 1998) (Table, No. 97-5488). Rehearing was denied, without opinion, on January 27, 1999. The opinion of the district court is published at: *Miccosukee Tribe v. United States*, 980 F. Supp. 448 (S.D. Fla. 1997).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit affirming the district court was entered on November 19, 1998.

Rehearing was denied on January 27, 1999.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a

> presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment provides in relevant part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

On March 16, 1995, the Miccosukee Tribe of Indians, its members, and the Tribe's Chairman, Billy Cypress, (hereinafter referred to as Plaintiffs, Petitioners, and/or Tribe) filed a seven-count Complaint asserting constitutional violations by federal defendants and the South Florida Water Management District ("SFWMD"), as well as a breach of

trust claim against federal defendants. (Appendix E).[1] The Counts alleged as follows: Count I alleged Equal Protection claims against federal defendants;[2] Count II alleged Equal Protection claims against the SFWMD under the Fourteenth Amendment; Count III alleged Due Process claims against federal defendants; Count IV alleged Due Process claims against the SFWMD under the Fourteenth Amendment; Count V alleged breach of trust claims against federal defendants; Count VI alleged an action in the nature of mandamus against all defendants; and Count VII alleged individual capacity claims against defendants Ring and West. (Appendix E).

The Tribe alleged that these violations occurred as a result of defendants' refusal to alleviate the discriminatory flooding of Tribal lands in the Florida Everglades. (Appendix E). The district court denied the Tribe's request for a preliminary injunction on March 31, 1995, finding that the Tribe had not established a likelihood of success on the merits. (R2-40).

The Tribe subsequently voluntarily dismissed, without prejudice, the individual capacity claims against defendants Barbara West and Richard Ring. (R4-107). On July 15, 1997, the district court held a non-evidentiary hearing on the

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1. Citations are to the record below or to the appendix herein, as referenced in the text. Record cites are indicated by the letter "R" followed by the number of the record volume, a dash and the relevant document number, and page or exhibit numbers. Citations to the appendix are indicated by the word "Appendix" followed by the appropriate letter and page number.

2. The Supreme Court has held that the Fifth Amendment contains an equal protection component such as found in the Fourteenth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

motions for summary judgment. (R6). The district court granted summary judgment in favor of the remaining defendants on August 1, 1997. (R4-122). The district court found that the SFWMD was entitled to Eleventh Amendment immunity as an agency of the State. (R4-122-13). The district court denied the Tribe's breach of trust claim, stating that the federal defendants did not breach any duty they had to the Tribe. (*Id.* R4-122-13). The district court denied the Tribe's due process and equal protection claims. (*Id.* R4-122-13). All the allegations were dismissed without allowing the Tribe any discovery. (R4-122-13).

The Tribe filed a timely notice of appeal from the court's order which granted summary judgment in favor of defendants. (R4-130). The Eleventh Circuit Court of Appeals issued an unpublished opinion on November 19, 1998 affirming the district court on the claims of equal protection, due process and the trust doctrine, but not deciding the issue of whether the SFWMD was immune under the Eleventh Amendment. In its per curiam opinion, the Eleventh Circuit found in favor of the SFWMD on the merits of the Tribe's constitutional claims even though in its decision, the district court had only addressed the immunity issue with regard to the SFWMD. (Appendix A and Appendix B).

B. Statement of Facts

This lawsuit arose out of defendants' discriminatory, disparate and unequal treatment of the Miccosukee Tribe of Indians of Florida and its members, during a flooding crisis which began in the Fall of 1994 and ended in mid-1995. Petitioner, the Miccosukee Tribe, is a federally-recognized Indian Tribe living on land in and around the Everglades National Park. (Appendix B at 9a). Petitioner, Billy Cypress,

is the Chairman of the Miccosukee Tribe. (Appendix E at 62a). While heavy rainfall in the Fall of 1994 greatly increased water levels in South Florida, the Tribe contended in a Complaint filed in federal district court, that defendants purposefully operated water management structures in a manner which placed upon the Tribe an undue burden and violated the Tribal members' constitutional rights of: equal protection because the Tribal members were purposefully and intentionally flooded to a greater extent than non-Indians; and due process because Tribal members were denied the right to practice their religion and were denied property rights as a result of the decimation of deer herds and every other form of wildlife in the Miccosukee's homeland, the Everglades. (Appendix E).

The case was disposed of prior to summary judgment and no discovery was allowed; therefore, the following facts do not represent all the facts which Petitioners could have presented if discovery had been allowed.

In September and October of 1994, South Florida, including the Everglades received record levels of rainfall; as a result of the heavy rains, Miccosukee Tribal lands were flooded. (R3-67-Ex. D, 1). On October 17, 1994, Tribal representatives informed the South Florida Water Management District of the need for emergency action by water managers to reduce flooding on Tribal lands in the Everglades. (R3-67, Ex. D, 1). The Tribe's lands in the Everglades include: a federal reservation in western Dade and Broward Counties, part of which is in Water Conservation Area 3A ("WCA 3A") (R3-122-3); a leased area north of the Everglades National Park, all of which is located in Water Conservation Area 3A; and a Permit Area directly south of

the leased area and Water Conservation Area 3A. (R3-122-3, 4).[3]

The hammocks and tree islands on Tribal lands have always been an integral part of the Miccosukee way of life, including the Tribe's religious practices. (R3-67-Ex. J, 3). An important part of the Tribe's religious practices is the annual planting and harvesting of corn, which could not take place on Tribal lands due to the prolonged flooding conditions defendants created in this case. (R3-67-Ex. J, 3). Historically, the hammocks and tree islands provided a dry refuge within the Everglades upon which Tribal members built chickees and set up Indian camps where Tribal members could practice their cultural and religious traditions. (R3-67-Ex. J, 3). Miccosukee Tribal members traditionally planted small farms on the hammocks, where they grew corn, pumpkin, squash, and other vegetables. (R3-67-Ex. J, 3). The hammocks and tree islands have been an ecosystem to themselves with numerous plants and animals either using them or located on them. (R3-67-Ex. J, 4). Miccosukee Tribal members traditionally used the plants for religion, medicine, to provide shelter, and for food. (R3-67-Ex J, 4).

However, the persistent flooding of the hammocks foreclosed the ability of the members of the Tribe to practice their religion, to use their lands, or to otherwise carry out their way of life. (R3-67-Ex. J, 4). Tree islands in Water Conservation Area 3A, which are integral to the Tribe's religious practices and lifestyle, were inundated for months as a direct result of defendants' actions, thereby depriving

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3. Subsequent to the Complaint herein, the United States Congress passed the Miccosukee Reserved Area Act which reasserted the Tribe's independence in governing the "permit area." *See* Miccosukee Reserved Area Act, Pub. L. No. 105-313, 112 Stat. 2964 (1998).

the Tribe of the use of those lands and their ability to practice their religious beliefs. (R3-67-Ex. J, 4).

The flooding adversely affected tropical hardwood hammocks as well as the ficus trees, gumbo limbo, and other tropical hardwoods. (R3-67-Ex. J, 4). Many of those trees were destroyed as a result of the persistent flooding conditions created by defendants and will not grow back to their pre-flood conditions for several generations. (R3-67-Ex. J, 4). Moreover, the destruction of the tropical hardwoods exposed the hammocks to erosion which could result in the hammocks' eventual destruction. (R3-67-Ex. J, 4).

Additionally, the deer population in the Water Conservation Areas was reduced by at least eighty percent (80%) to ninety percent (90%) as a result of the flooding of Tribal lands. (R3-67-Ex. K, 2-3). After months of inundation, the deer became weaker and died due to stress and starvation. (R3-67-Ex. K, 2-3). The Florida Game and Fresh Water Fish Commission estimated 80 to 85% of the deer herd died as a direct result of the flooding conditions caused by the defendants. (R3-67-Ex K, 2-3). The Tribe estimated the figure between 80% to 90%. (R3-67-Ex. K, 2-3). It will take between five to ten years before the deer herd can return to its pre-flood population. (R3-67-Ex. K, 3).

In addition to deer, almost every other form of wildlife was adversely affected by the persistent high water conditions caused by defendants. (R3-67-Ex. K, 3-4). The rodent population decreased substantially, producing starvation and stress up the food chain. (R3-67-Ex. K, 3-4). The minnows and other fish scattered, causing their predators (wading birds, raccoons, otters, etc.) undue hardship. (R3-67-Ex. K, 3-4). Wading birds were not able to successfully nest, resulting in a decline of the endangered Florida Wood Stork. (R3-67-Ex. K, 3-4).

On October 18, 1994, Tribal representatives communicated the Tribe's flooding crisis to numerous officials at the U.S. Army Corps of Engineers ("Corps") in Jacksonville, Florida. (R3-67-Ex. D, 2). Corps officials refused to increase water delivery through the S-333 water control structures, which would alleviate flooding on Tribal lands, based on their concerns for providing flood relief to non-Indian property owners. (R3-67-Ex. D, 4; R3-67-Ex. C, 1).

The Corps believed the removal of weeds and other unnatural vegetation behind the S-12 structures should be undertaken, and that this would allow more water to flow through the S-12 A through D structures, and alleviate flooding of Tribal lands. (R3-67-Ex. D, 2). However, despite the need to increase water flows through S-12 A through D and/or S-333 structures in order to alleviate flooding on all Tribal lands (Reservation, WCA 3A and the Permit Area), no action was taken by any of the defendants with respect to those two principal flow-ways. (R3-67-Ex. D, 3).

In early November 1994, after defendants purposefully refused to alleviate flooding conditions on Tribal lands, Tropical Storm Gordon brought additional and substantial increases in water levels on all Tribal lands. (R3-67-Ex. D, 2). Immediately thereafter, the Bureau of Indian Affairs notified the Department of the Interior that Tribal infrastructure, roads, homes, and property "received significantly adverse impact" as a result of the record levels of rainfall during the preceding months. (R3-67-Ex. E).

Representatives of the Bureau of Indian Affairs ("BIA") contacted the Corps to obtain recommendations for alleviating the severe flooding conditions on Tribal lands. (R3-67-Ex.

E; R3-67-Ex. F, 2). In a memorandum dated November 3, 1994, the Department of Interior was advised that immediate flood relief measures, including removal of "vegetation growth blocking flow at either end of the gateway channel from the S-12," were required. (R3-67-Ex. E, 1). The U.S. Army Corps of Engineers favored the removal of vegetation behind the S-12 structures to reduce Tribal flooding and had determined that such vegetation removal would have no adverse effect on Everglades National Park. (R3-67, Ex. D, 3).

Numerous meetings were held in early November, 1994, between representatives of the federal government, to address the flooding. (R3-67, Ex. D, 2-4). On November 15, 1994, during a telephonic conference between the Tribe and state and federal entities to address the Tribe's flooding crisis, the U.S. Army Corps of Engineers and the South Florida Water Management District stated that they favored removal of the vegetation behind the S-12 structures. (R3-67-Ex. D, 3). During that conversation, defendant Richard Ring, the Superintendent of Everglades National Park, rejected the water managers' proposal. (R3-67-Ex D, 3). Barbara West [Department of Interior] supported Ring's refusal and added that the federal government's obligation was to Everglades National Park and not to the Miccosukee Tribe. (R3-67-Ex D, 3). Ms. West also remarked that the Tribe had a diminished status and lesser flood protection rights because the land where Tribal members lived was a "permit area" in Everglades National Park. (R3-67-Ex D, 3). The flooding crisis was not limited to the "permit area" but also included the Tribe's reservation lands held in trust. (R3-67-Ex. F, 1; Ex. G).

During a meeting on November 21, 1994, the South Florida Water Management District and the U.S. Army Corps of Engineers agreed that vegetation removal behind the S-12 structures would assist in relieving the flooding of Tribal lands. (R3-67-Ex. D, 4). In support of their position, the Corps officials presented a study prepared by the U.S. Geological Survey in which they found that vegetation removal behind the S-12 structures increased water flows by fifteen (15) percent. (R3-67-Ex. D, 4). The Florida Game and Fresh Water Fish Commission had also previously advocated the vegetation removal, which they found was "successfully implemented downstream from nearby structures last year and resulted in increased conveyance." (R3-67-Ex. I).

However, despite months of discussions with defendants aimed at alleviating flooding conditions on all Tribal lands, and despite admissions that vegetation removal would alleviate the flooding, defendants knowingly kept the Tribe's lands and its resources flooded until mid-1995. (R3-67-Ex. C, 4). In the case of the S-12 structures, the federal and state water managers acknowledged the need to implement the vegetation removal behind those structures in order to reduce flooding conditions on the Federal Reservation, WCA-3A, and the permit area, but did not take the appropriate and required action. (R3-67-Ex. B, 2). With respect to the S-333 water control structure, Everglades National Park requested opening of this gate but was overruled by the Army Corps based on the Corps' desire to protect non-Indians, residents of West Dade and South Dade. (R3-67-Ex. C, 2).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S DECISION TO AFFIRM THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT PRIOR TO ANY DISCOVERY DOES NOT COMPLY WITH SETTLED SUPREME COURT LAW AND CONFLICTS WITH OTHER APPELLATE PRECEDENT.

Petitioners, the Miccosukee Tribe of Indians of Florida and Billy Cypress, Chairman of the Miccosukee Tribe, respectfully request that this Court grant this Petition for a Writ of Certiorari to correct the erroneous decision of a panel of the Eleventh Circuit Court of Appeals which affirmed the district court's decision to deny Petitioners any discovery before summary judgment.

The Eleventh Circuit panel's affirmance of the grant of summary judgment by the district court, is not consistent with Supreme Court and other applicable precedent. Parties are entitled to adequate discovery before summary judgment. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Jones v. City of Columbus*, 120 F.3d 248 (11th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1797 (1998), and *WSB-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988). In this case, no discovery was permitted, and the district court made substantial findings of fact on disputed issues. For example, the district court found in its order granting summary judgment that "federal defendants have produced evidence showing non-discriminatory reasons for denying the Tribe's request." (Appendix B at 45a). The court further found that "[t]he Tribe has not shown that these reasons were a pretext

for discrimination." (Appendix B at 45a).[4] Thus, the district court required the Tribe to rebut the defendants' allegations but did not allow any discovery. The district court imposed on the Tribe a pre-discovery burden which is not consistent with precedent, and the Eleventh Circuit erroneously affirmed this decision.

In its *per curiam*, unpublished opinion, the Eleventh Circuit panel stated that the Tribe did not set forth specific, non-conclusory facts that would enable it to prove its claims. (Appendix A at 6a). In support of that proposition, the panel cited to the recent Supreme Court case of *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584, 1596-97 (1998). The Eleventh Circuit's reliance on the Supreme Court decision of *Crawford-El* for the proposition that summary judgment affidavits must set forth specific facts showing there is a genuine issue for trial before there is any discovery was an error and involved an incorrect statement of the law. The Supreme Court in *Crawford-El* did not hold that a party is not entitled to discovery prior to granting summary judgment, or that a party must set forth specific non-conclusory facts in affidavits before any discovery is ever allowed. Indeed, longstanding Supreme Court precedent supports Petitioners' argument that summary judgment is not proper prior to discovery, in cases such as the one at bar, which do not involve individual capacity claims against public officials for damages. In this case, both individual capacity claims originally set forth in the Complaint were voluntarily dismissed by the Tribe in advance of the final order in this matter. (Appendix B at 8a).

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4. *See also* Appendix B at 35a for another instance where the district court required the Tribe to rebut the defendants' allegations, without affording the Tribe discovery, and where the district court made a finding of fact against the Tribe.

In relying on the *Crawford-El* case, which involved a qualified immunity claim against a government official, the Eleventh Circuit panel opinion in the case at bar imposed a higher pre-discovery burden on the Tribe than has heretofore been exacted in cases not involving individual damages suits against public officials. The Supreme Court framed the specific question in *Crawford-El* as: whether, at least in cases brought by prisoners, the plaintiff must adduce clear and convincing evidence of improper motive to defeat a motion for summary judgment. *Crawford-El v. Britton*, 523 U.S. at __, 118 S. Ct. at 1587.

The broad question framed in the Supreme Court opinion in *Crawford-El* was whether courts of appeal may craft special procedural rules in cases based on claims that require proof of improper motive to protect public servants from the burdens of trial and discovery. *Crawford-El v. Britton*, 523 U.S. at __, 118 S. Ct. at 1587. The Plaintiff in *Crawford-El* sought damages for alleged constitutional violations that required proof of improper motive. *Id.* The Supreme Court rejected the clear and convincing standard of proof which had been imposed by the court below. *Crawford-El v. Britton*, 523 U.S. at __, 118 S. Ct. at 1590. The Supreme Court stated that in fashioning a special rule for constitutional claims that require proof of improper intent, the judges of the court of appeals relied on *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), but, the Supreme Court further reasoned, neither *Harlow* nor the concerns expressed by the Court of Appeals in *Crawford-El*, "warrant the wholesale change in the law that they have espoused." The Supreme Court also stated that:

> [w]ithout such precedential grounding, for the Courts of Appeals or this Court to change the burden of proof for an entire category of claims

> would stray far from the traditional limits of judicial authority.

523 U.S. at __, 118 S. Ct. at 1595.

The Supreme Court also confirmed that the Court of Appeals'

> indirect effort to regulate discovery employs a blunt instrument that carries a high cost, for its rule also imposes a heightened standard of proof at trial upon plaintiffs with bona fide constitutional claims.

Id.

The Eleventh Circuit, in affirming the district court's order granting summary judgment, in effect, employed the blunt instrument against the Tribe which this Court rejected in *Crawford-El*, and more importantly, in the case at bar, there were no plausible concern with regard to protecting public officials from the costs associated with the defense of damages actions because the claims against the individuals were previously dismissed by the Tribe.

Without discovery, the Tribe should not have been forced into a summary judgment posture on the merits of its claims. Therefore, the decision on issues as to whether the governmental action impinged on the Tribe's religious exercise and whether there was proof of intent to discriminate was premature prior to discovery.

The Eleventh Circuit incorrectly relied on Supreme Court precedent, which did not involve pre-discovery summary judgment, to support its decision.

The panel opinion relied on *Washington v. Davis*, 426 U.S. 229, 240 (1976), and *Parks v. City of Wasner Robins Co.*, 43 F.3d 609, 616 (11th Cir. 1995), for the proposition that equal protection claims require proof of intent to discriminate. The panel relied on *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197-200 (1989), for the proposition that a due process claim requires the Tribe to prove either that there is a "special relationship" which arises only in limited circumstances: incarceration, institutionalization, or other similar restraints of personal liberty.

However, the Eleventh Circuit's reliance on *Washington v. Davis* was misplaced. The Supreme Court in *Washington v. Davis* noted that "discovery and other proceedings followed [the Amended Complaint]." *Washington v. Davis*, 426 U.S. at 233-34. Thus, *Washington v. Davis* did not involve a similar situation to the one here where no discovery was afforded to Petitioners. The burden imposed on the Tribe to prove intent to discriminate prior to discovery was unjustified and inconsistent with relevant precedent.

The Eleventh Circuit's reliance in *DeShaney v. Winnebago County* was also misplaced. In *DeShaney*, the Supreme Court did not limit due process violations to instances where there is some restraint on liberty but, rather, stated that the restraint of liberty triggered the protections of the due process clause. In this case, the Tribe has a special trust relationship with the United States, which although not a restraint on liberty, does require that the United States be judged "by the most exacting fiduciary standard." *United States v. Mason*, 412 U.S. 391, 398 (1973). This special fiduciary relationship imposes a duty upon the United States and also triggers the due process clause. The Supreme Court has used such terms as "solemn,"

and "special," to describe the federal government's relationship with Indian Tribes. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The duty imposed upon the United States by the trust doctrine, *see, e.g., United States v. Kagama*, 118 U.S. 375, 384 (1886), was violated here by intentionally flooding the Tribe's lands to provide flood protection for non-Indian lands. This intentional flooding, supported by the record even without discovery, violates the duty imposed under the trust doctrine as well as constitutional due process rights of Tribal members and it is the same type of "special relationship" which was addressed in *DeShaney*.

The Eleventh Circuit panel also relied on the case of *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-46 (1993), for the proposition that the Tribe failed to sustain a due process claim, and that the Tribe failed to show that the governmental action that impinged on the Tribe's religious exercise was not neutral and generally applicable. (Appendix A at 4a). However, *Church of the Lukumi* noted that facial neutrality is not determinative of whether a law violates the free exercise clause, and that the free exercise clause forbids subtle departures from neutrality. *Id.* at 534. Moreover, in relying on the case of *Church of Lukumi Babalu-Aye Inc.*, the Eleventh Circuit failed to address the difference in the posture of the case which in *Church of Lukumi Babalu-Aye* included a nine-day bench trial. *Id.* at 528. Additionally, the Plaintiffs here alleged due process violations as a result of the flooding which deprived Plaintiffs of the right to practice their religion and of their enjoyment of tribal lands and not a violation of the First Amendment's free exercise clause.

In affirming the district court, the Eleventh Circuit disregarded settled precedent which states that summary

judgment is improper where there are disputed issues of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Under established precedent of the Supreme Court, the Tribe should not have been forced to explain why it was entitled to discovery because parties are entitled to discovery prior to summary judgment. *See Celotex*, *supra*, 477 U.S. at 317. The Tribe's Complaint complied with the pleading requirements of the Federal Rule of Civil Procedure 8 and neither the *Crawford-El* case, nor any of the cases relied upon by the Eleventh Circuit, require more specificity than that provided in Plaintiffs' Complaint for claims which are *not* individual capacity claims against public officials for damages.

The Supreme Court in *Crawford-El* explained existing procedures available to judges in handling claims of improper motive. *Crawford-El v. Britton*, 523 U.S. __, 118 S. Ct. at 1596. However, the Supreme Court clearly was referring to prisoner cases or individual capacity suits, and the Petitioners dismissed their individual capacity claims against the federal officials. The Eleventh Circuit relied on this Court's analysis in *Crawford-El*, *supra*, 523 U.S. at __, 118 S. Ct. at 1596-97 (Appendix A at 4a), to require more specific allegations in Petitioners' Complaint. *Crawford-El* did not require specificity for constitutional claims or other claims not involving individual capacity allegations for damages. Thus, the Eleventh Circuit, by relying on procedures available in actions for damages in individual capacity claims, mistakenly required a higher pleading standard from the Petitioners than is required by precedent for equitable claims such as the ones asserted here.

Moreover, the Tribe submitted numerous affidavits to the district court, which, even without discovery, challenged the assertions by defendants and supported the need for discovery. The Tribe alleged that Tribal lands were flooded

to protect non-tribal lands and that the Tribal members were denied their right to practice their religion. The Tribe filed a motion under Fed. R. Civ. P. 56(f) to foreclose summary judgment prior to discovery. To its Rule 56(f) motion, the Tribe attached an affidavit by Truman Eugene Duncan, Jr. (herein "Duncan") Director of Water Resources at the Miccosukee Tribe, which alleged in pertinent part that Tribal lands were more adversely affected than Everglades National Park and that Tribal lands were more adversely affected than the lands of other landowners. (R3-65-Ex. C, 1).

Mr. Duncan's affidavit further asserted that without discovery on the alleged operating criteria and schedules for flood protection, the defendant's claims that they operated the structures which flooded the Tribe according to schedule could not be adequately rebutted. Nevertheless, based on Mr. Duncan's personal observations of the actions taken by the defendants, Mr. Duncan did not believe their actions were based on any such schedule. As an example, one of the water control structures, the S-333, was not opened until just a few days after their lawsuit was filed at a time when most of the area was dry but Tribal lands remained flooded. Moreover, the refusal to cut vegetation on the S-12 structures was not based on the regulation schedule or operating criteria. Mr. Duncan participated in meetings and discussions where defendants stated that flood protection for the Park was more important than flood protection for the Tribe, and this fact was set forth in his affidavit. (R3-65-Ex. C, 2-3).

In addition to the affidavit filed with the Tribe's Rule 56 motion, Mr. Duncan also filed several affidavits attached to the Tribe's Summary Judgment Response. In one, Mr. Duncan provides further support for the Tribe's claim that Tribal lands "were more adversely affected by flooding conditions than

Everglades National Park and *other landowners* as a result of defendants' actions." (Emphasis supplied). (R3-67-Ex. C, 1). In another affidavit of Mr. Duncan, attached to the Tribe's Response to the United States' Motion for Summary Judgment, he attested that Barbara West [Department of the Interior] had stated that the federal government's obligation was to the Park and not to the Tribe and that the Tribe had a "diminished status" and lesser flood protection rights because the land where tribal members lived is a permit area.[5] (R3-67-Ex. D, 3). In fact, Ms. West was incorrect because, nothing in the permits drafted by the Park Service took away the Tribal members' constitutional rights to equal protection and due process, nor could mere permits issued by the Park Service deprive Tribal members of constitutional rights. Moreover, the flooding crisis was not limited to the permit area but included the Tribe's reservation lands held in trust. (R3-67-Ex. F, 1; Ex. G).

The affidavits outlined above, and the allegations of the Complaint, set forth specific, non-conclusory factual allegations which satisfy even the stricter requirements sometimes imposed by courts in prisoner cases or individual capacity claims for damages. *See Crawford-El v. Britton*, 523 U.S. at __, 118 S. Ct. at 1596-97.

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5. Ms. West's comments were also heard by another Tribal employee, who filed an affidavit, and a tribal attorney. The Tribal attorney's affidavit also stated that Federal Defendants' decision not to offer flooding assistance was "based on [the Tribe's] pending Everglades restoration lawsuits." (*See* R3-67-Ex. F, 2, Exhibit F at p. 2). *See, e.g., Pickering v. Board of Ed. Township High School Dist. 205, Will Cty*, 391 U.S. 563 (1968), cited in *Crawford-El*, at 1592, n.10 (retaliation offends the Constitution because it threatens to inhibit exercise of the protected right).

The Eleventh Circuit's affirmance of the district court's grant of summary judgment was inconsistent with Supreme Court precedent which says a party is entitled to discovery before summary judgment motions. The Eleventh Circuit incorrectly required specificity in the Tribe's Complaint not required by Supreme Court precedent and actually rejected by this Court in *Crawford-El* where this Court stated that the Court of Appeals' indirect effort to regulate discovery employs a blunt instrument that carries a high cost, "for its rule also imposes a heightened standard of proof at trial upon plaintiffs with bona fide constitutional claims," *Crawford-El v. Britton*, 523 U.S. at __, 118 S. Ct. at 1595, *citing to*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-55 (1986).

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE EVEN IF *CRAWFORD-EL v. BRITTON* CHANGED OR HEIGHTENED PLEADING REQUIREMENTS, PLAINTIFFS SHOULD HAVE BEEN PERMITTED TO AMEND THEIR COMPLAINT.

Even if *Crawford-El supra*, 523 U.S. 574, 118 S. Ct. 1584 (1998), broadly applied to all constitutional claims as the Eleventh Circuit implicitly found here, at a minimum, the case should have been remanded, and Petitioners should have been allowed to amend their Complaint. When the Eleventh Circuit relied on an intervening Supreme Court decision which required more specific pleading requirements in claims for constitutional violations, and applied this decision retroactively, the Petitioners were denied fundamental fairness, procedural due process and equity.[6]

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6. In the prior opinion of the appellate court in *Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991), the D.C. Circuit (Cont'd)

The Federal Defendants here supplemented the record on appeal with the opinion of the Supreme Court in *Crawford-El*, sending a notice of supplemental authority to the Eleventh Circuit only days before the oral argument in this case. (Appendix D at 50a n.1). *Crawford-El* was decided on May 4, 1998 and oral argument was held on November 4, 1998. None of the parties had previously relied on the *Crawford-El* opinion.

Petitioners dispute that *Crawford-El* was the applicable law here, and dispute that the Supreme Court in *Crawford-El* decided to require more specific pleading requirements for constitutional cases not involving individual capacity claims for damages. However, even if *Crawford-El* does require a new and heightened pleading standard such as imposed by the Eleventh Circuit on Petitioners here, or even if *Crawford-El* clarifies the pleading requirements, procedural due process, fundamental fairness and general principles of equity, required a remand to the district court to allow the Petitioners to Amend their Complaint to satisfy the new requirements.

Procedural due process is a flexible concept that varies with the particular situation. *Zinermon v. Burch*, 494 U.S. 113, 127 (1990); *see also Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (due process is flexible and calls for such procedural protections as the particular situation demands). At a minimum, in this case, Petitioners were entitled to a remand based on the Eleventh Circuit's heightened specificity requirement. In requiring the Tribe to have pled with more

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(Cont'd)
returned the case allowing Plaintiff to replead where a new case clarified the contours of the pleading standard requirements there. No such opportunity was afforded to the Tribe and its Chairman here by the Eleventh Circuit Court of Appeals.

specificity, based on an intervening Supreme Court decision, the Eleventh Circuit imposed a new standard which resulted in manifest injustice and denial of procedural due process to Petitioners. Prior to the opinion in *Crawford-El*, relied upon by the Eleventh Circuit, such specificity had not been required. Thus, even if *Crawford-El* requires a heightened pleading standard for all constitutional allegations, even those which are not individual capacity suits, the Eleventh Circuit erred in not remanding to allow the Petitioners, the Miccosukee Tribe of Indians of Florida and Chairman Billy Cypress, to amend their Complaint.

CONCLUSION

For all the foregoing reasons, the Petitioners request that this Court grant certiorari to address the erroneous decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED NOVEMBER 19, 1998

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5488

D.C. Docket No. 95-532-CV-EBD

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
a federally-recognized Indian Tribe; BILLY CYPRESS

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida, Miami Division

(November 19, 1998)

Appendix A

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

I.

The Miccosukee Tribe of Indians of Florida and its chairman Billy Cypress (collectively "the Tribe") allege that the various federal defendants and the South Florida Water Management District violated the Tribe's due process and equal protection rights in failing to alleviate the flooding that resulted from the heavy rains that fell on south Florida during the late summer and fall of 1994. The Tribe also alleges that the federal defendants violated their trust obligations to the Tribe. Five months after the Tribe filed its complaint, the district court denied the Tribe's rule 56(f) motion to postpone consideration of the defendants' summary judgment motions and stayed discovery pending disposition of those motions. *See* Fed. R. Civ. P. 56(f). It then granted summary judgment for the defendants, holding that: (1) the District is entitled to Eleventh Amendment immunity; and (2) the federal defendants did not breach their duty of trust to the Tribe, or violate the Tribe's due process or equal protection rights. The Tribe appeals the denial of its rule 56(f) motion and the accompanying discovery stay, as well as the district court's grant of summary judgment. We affirm.

II.

The first issue we address in this appeal is whether the federal defendants violated their duty of trust to the Tribe. We conclude that they did not. Although the federal

defendants do not dispute that they owe the Tribe a *general* duty trust, the government does not assume any *specific* duties to the Indian Tribes beyond those found in statutes, regulations, treaties, or other agreements. *Compare United States v. Mitchell*, 463 U.S. 206, 224-28 (1983) (statutes and regulations giving the federal government full responsibility to manage Indian resources and land for the benefit of Indians created fiduciary relationship, breach of which gave rise to a claim for damages), *with Vigil v. Andrus*, 667 F.2d 931, 934 (10th Cir. 1982) (no statute or treaty required government to provide free lunches to Indian schoolchildren). Here, none of the applicable statutes, regulations, or agreements give the Tribe rights to the specific measures it requested.

III.

Second, we address whether the Tribe raised a genuine issue of material fact as to its due process or equal protection claims against the federal defendants. We conclude that it did not. The equal protection claim requires proof of discriminatory intent, *see Washington v. Davis*, 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."); *Parks v. City of Warner Robins, Ga.*, 43 F.3d 609, 616 (11th Cir. 1995) ("[P]roof of discriminatory intent or purpose is a necessary prerequisite to any Equal Protection Clause claim."); and the due process claim requires the Tribe to prove either that there is a "special relationship" between the Tribe and the federal defendants that gives rise to a governmental duty of care, *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197-200 (1989) (A "special relationship" only arises in

limited circumstances: "incarceration, institutionalization, or other similar restraint of personal liberty."), or that the governmental action that impinged on the Tribe's religious exercise was not neutral and generally applicable, *see Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-46 (1993). The Tribe has not alleged any specific, nonconclusory facts that would enable it to prove these claims. *See* Fed. R. Civ. P. 56(e) (Summary judgment affidavits "must set forth specific facts showing that there is a genuine issue for trial."); *Crawford-El v. Britton*, 118 S.Ct. 1584, 1596-97 (1998) (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)) ("[T]he court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.").

IV.

Third, we address whether the Tribe failed to raise a genuine issue of material fact as to its due process and equal protection claims against the District. We conclude that it did. We rest our decision on this ground, rather than on the Eleventh Amendment immunity ground on which the district court relied, for two reasons. First, whether the District is an arm of the state or a political subdivision is a close question, one that we may not be able to decide on this record. For instance, the State of Florida exercises significant control over the District, *see, e.g.*, Fla. Stat. Ann. § 373.073 (West 1997 & Supp. 1998) (The governor appoints all of the District's board members.); Fla. Stat. Ann. § 373.114 (West 1997 & Supp. 1998) (The governor and his cabinet and the Florida Department of Environmental Protection may review all of

the District's orders and rules, other than those relating to internal operating procedures.); Fla. Stat. Ann. §§ 373.507, 373.536(5) (West 1997 & Supp. 1998) (The governor may approve or disapprove, in whole or in part, the District's annual budget.); *but see Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30,47-48 (1994)(warning against according control factors too much weight), but, like political subdivisions, the District may levy *ad valorem* taxes on property. *See* Fla. Stat. Ann. § 373.503 (West 1997). Resolution of this issue would likely require us to remand this case to the district court for further factual development, or perhaps even to certify to the Florida Supreme Court unclear issues of state law on which the arm-of-the-state inquiry might turn.

The second reason we do not address the Eleventh Amendment immunity issue is that we have already resolved the merits issues. The Tribe's due process and equal protection claims against the District are identical to its claims against the federal defendants. Since those claims fail against the federal defendants, they also fail against the District.[1]

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1. We recognize that Eleventh Amendment immunity is a matter jurisdiction, which we usually resolve before we consider the merits of a case. *See, e.g., Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 98 (1984) ("[T]he principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III."); *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 279-81 (1977) (resolving the Eleventh Amendment immunity issue before considering the merits). But it would benefit neither this court nor the parties to engage the immunity issue where doing so would only prolong this litigation without changing its inevitable outcome. *See Steel Co. v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1014 (1998); *Norton v. Mathews*, 427 U.S. 524 (1976).

V.

Finally, concerning the Rule 56(f) issue, the Tribe has not demonstrated how further discovery would "enable [it] . . . to rebut the [defendants'] showing of the absence of a genuine issue of fact." *SEC v. Spencer & Green Chemical Co.*, 612 F.2d 896, 901 (5th Cir. 1980)[2] (quoting *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975)) (internal quotation marks omitted). The district court therefore did not abuse its discretion in denying the Tribe's rule 56(f) motion and staying discovery pending disposition of the defendants' summary judgment motions. *See Jones v. City of Columbus*, 120 F.3d 248, 251 (11th Cir. 1997) (abuse of discretion review for discovery decisions generally); *Barfield v. Brierton*, 883 F.2d 923, 931 (11th Cir. 1989) (abuse of discretion review for rule 56(f) decisions); *see generally Crawford-El*, 118 S.Ct. at 1596-97 (quoting *Siegert v. Gilley*, 500 U.S. at 236. (A district court "may insist that the plaintiff put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.").

For the foregoing reasons, we affirm the district court's orders denying the Tribe's Rule 56(f) motion and staying discovery and the district court's grant of summary judgment in favor of the defendants.

AFFIRMED.

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2. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent the decisions of the former Fifth Circuit issued before October 1, 1981.

APPENDIX B — OMNIBUS ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED JULY 31, 1997 AND FILED AUGUST 1, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CV-95-0532

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, a federally recognized Indian Tribe; and BILLY CYPRESS

Plaintiffs,

v.

UNITED STATES OF AMERICA, et al.

Defendants.

OMNIBUS ORDER

BEFORE THE COURT are several motions: (1) the Federal Defendants' Motion for Summary Judgment (D.E. # 45); (2) the Motions of Individual Defendants West and Ring for Summary Judgment and to Dismiss for Lack of Personal Jurisdiction (D.E. # 47); (3) Defendant South Florida Water Management District's Motion for Final Summary Judgment (D.E. # 51); (4) Defendant South Florida Water Management District's Motion to Strike Opposition Memorandum (D.E. # 102); (5) the Plaintiffs' Motion for Leave to File a Memorandum of Law in Opposition to the

District's Notice of Filing (D.E. # 110); (6) the Plaintiffs' Motion to Strike Notice of Filing (D.E. # 111); (7) the Plaintiffs' Motion to Foreclose Summary Judgment on the issue of Eleventh Amendment Immunity (filed July 8, 1997); and (8) the Federal Defendants' Motion to Strike Supplemental Affidavit of Truman Duncan (filed July 14, 1997).

The motions raise a number of issues relating to flooding in 1994 and 1995 of land occupied by the Miccosukee Tribe of Indians of Florida ("the Miccosukee Tribe" or "the Tribe"). The Tribe and its Chairman filed a seven-count complaint on March 16, 1995, asserting breach of trust, due process and equal protection claims against the Defendants for allegedly refusing to alleviate flooding on three separate parcels of land in the Florida Everglades occupied by the Tribe. The complaint seeks a writ of mandamus and damages.

The Plaintiffs moved for a preliminary injunction, which the Court denied on March 31, 1995, finding that they had not established a likelihood of success on the merits. The Defendants filed their respective motions for summary judgment in May 1995. The Court denied the Plaintiffs' motion to foreclose summary judgment pending discovery in August 1995. The Court notes that it previously allowed the Plaintiffs to voluntarily dismiss their claims against Defendants Barbara West and Richard Ring in their individual capacities (D.E. # 109), thereby rendering the summary judgment motion of those Defendants (D.E. # 47) moot.

The remaining parties have extensively briefed the issues and submitted hundreds of pages of supporting documents. The Court has carefully considered the lengthy record in this

case, as well as the oral arguments of counsel presented at the July 15, 1997 hearing.[1] After a thorough review, the Court will grant summary judgment in favor of all remaining Defendants.

FACTUAL BACKGROUND

A. The Parties

The Miccosukee Tribe is a federally recognized Indian Tribe living on land in and around Everglades National Park. Plaintiffs' Consolidated Response in Opposition to the Defendants' Motion for Summary Judgment ("Response") at 2-5. Plaintiff Billy Cypress is the Tribe's Chairman. Response at 8.

Defendants United States of America, United States Department of the Interior, United States Army Corps of Engineers, Barbara West (Special Assistant to the Assistant

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1. At the hearing, counsel for the Plaintiffs renewed their motion to foreclose summary judgment pending discovery. Plaintiffs' counsel did not state what specific facts he expected further discovery to produce. A party opposing summary judgment must rely on more than vague assertions that additional discovery will produce needed, but unspecified facts. *Barfield v. Brierton*, 883 F.2d 923, 931 (11th Cir. 1989). Granting summary judgment on the basis of affidavits is proper under Federal Rule of Civil Procedure 56. A party may not defeat a properly supported summary judgment motion by raising general questions about an opponent's affidavits. *Robinson v. Cheney*, 876 F.2d 152, 162 (D.C. Cir. 1989). There is no need for a district court to allow a party to present additional evidence or cross examine affiants where it has raised no genuine issue of material fact. *LCM Enter., Inc., v. Town of Dartmouth*, 14 F.3d 675, 681 (1st Cir. 1994).

Secretary of the Interior for Fish, Wildlife and Parks), and Richard G. Ring (Superintendent of Everglades National Park) (collectively the "Federal Defendants"), are responsible for the design, implementation and continued supervision of flood control and water management projects in and around Everglades National Park. Order Denying Motion for Preliminary Injunction ("P.I. Order") at 2. Defendant South Florida Water Management District ("SFWMD" or "the District") is a political subdivision of the state of Florida that oversees the operation of those projects in conjunction with the Army Corps of Engineers ("the Corps"). *Id.*

B. *Tribal Occupation of the Land at Issue*

The Miccosukee Tribe has lived in the area that now is Florida for hundreds of years. Response at 2. However, any "aboriginal" rights that the Tribe had to Florida land were extinguished when, as part of a court settlement, the United States paid $16 million to the Seminole Nation of Indians to compensate its members for their territory.[2] *See Seminole Indians of Fla. and Seminole Nation of Okla. v. United States*, 13 Indian Claims Comm'n 326 (1964); *Id.*, 38 Indian Claims Comm'n 91; *United States v. Dann*, 470 U.S. 39 (1985).[3]

Three separate areas in and around Everglades National Park are at issue in this lawsuit. Attach. 1 and 2 to Federal

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2. The Miccosukee Tribe is a successor in interest to the Seminole Nation. Response at 2 n.2. The Federal Defendants do not dispute this. Motion for Summary Judgment at 12 n.6.

3. *See also* The Florida Indian Land Claims Settlement Act of 1982, codified at 25 U.S.C. § 1741-1749, discussed *infra*.

Appendix B

Defendants' Proposed Findings of Uncontroverted Fact; Belli Decl. at ¶ 2(b). First, the Miccosukee Federal Indian Reservation ("the Reservation") comprises about 75,000 acres in western Dade and Broward counties bisected by Interstate 75. Response at 4; Florida Statutes Chapter 285. Almost 50,000 acres of the Reservation are located within Water Conservation Area 3A ("WCA 3A"), which is part of the flood control area mentioned in Section A *supra*. The Lease at 2. No tribal members currently reside on the Reservation. Response at 4.

The second parcel is known as the Leased Area. It is a 189,000-acre tract of land to the east and south of the Reservation and to the north of Everglades National Park, to which the Tribe holds a perpetual lease ("the Lease") from the state of Florida. *See* the Lease. The Leased Area is located entirely within WCA 3A. *Id.* The Tribe and the state entered into the Lease as part of the settlement in *Miccosukee Tribe of Indians of Fla. v. Florida, No.* 79-253-CIV-KEHOE (S.D. Fla. April 16, 1982) ("the Settlement Agreement"). *Id.*

In return for the Lease and certain hunting, fishing, frogging, residential and commercial rights in the Leased Area, the Tribe agreed to give up all aboriginal title claims to land in Florida. Settlement Agreement at 2, 3, 7, 8. In addition, the Settlement Agreement gave the SFWMD the right to operate its flood control projects in the Leased Area. *Id.* at 5. The Settlement Agreement was approved by Congress in The Florida Indian Land Claims Settlement Act of 1982, codified at 25 U.S.C. § 1741-1749. Response at 5.

Appendix B

The Lease incorporated all terms of the Settlement Agreement. The Lease at 3, 14. It gave the Tribe the right to farm the Leased Area, reside there, and use it for religious and cultural purposes. The Lease at ¶¶ 3(b), 3(c). But those rights were not absolute. *Id.* at ¶ 6. The Lease states that all of the Tribe's rights listed in Paragraphs 1-5 and 7 are subject to the rights of the SFWMD and the Corps to operate flood control and water management projects in the Leased Area. *Id.*

Historically, islands of trees in the Leased Area have been the site of the Tribe's religious and cultural practices. Terry Aff. at ¶ 7. The tree islands provide dry spots within the Everglades where tribal members can build traditional Indian huts known as chickees, and plant corn and other vegetables. *Id.* An integral part of the Tribe's religious tradition is the spring planting of corn, accompanied by the Green Corn Dance. *Id.* at ¶¶ 7, 8. The tree islands also are a source of plants used in traditional tribal medicines. *Id.* at ¶ 11.

The third area in question is known as the Permit Area, and is located directly south of the Leased Area and WCA 3A. Response at 3; Federal Defendants' Motion at 3. The Permit Area is a 333-acre strip of land, 5 1/2 miles long and 500 feet wide, located on either side of U.S. Highway 41 at the northern edge of Everglades National Park. Response at 3; Federal Defendants' Motion at 3. It is the Tribe's primary residential, commercial and administrative center. Response at 3; Federal Defendants' Motion at 3. The Tribe occupies the land pursuant to a Special Use Permit from the United States, negotiated in conjunction with the creation of the Park. Response at 3. The Permit is subject to federal statutes giving

the National Park Service discretion in operating the Park. Attach. 15 to Federal Defendants' Proposed Finding of Uncontroverted Fact at ¶ 22.

C. *Management of the Land*

A variety of federal and state laws, as well as the Lease, the Settlement Agreement, and the Special Use Permit, control management of the land at issue in this case. Federal Defendants' Motion at 6-9. For example, the National Park Service Organic Act, 16 U.S.C. § 1 *et seq.*, and the Everglades National Park Act, 16 U.S.C. § 410, control management of Everglades National Park. Belli Decl. at ¶ 1.

The National Park Act states that the purpose of creating national parks is to "conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. Congress has further indicated that "the protection, management, and administration of these areas . . . shall not be exercised in derogation of the values and purpose for which these various areas have been established, except as may have been or shall be directly and if specifically provided by Congress." 16 U.S.C. § la-1.

The Department of the Interior, through the National Park Service, manages Everglades National Park. 16 U.S.C. § 410b. The Everglades National Park Act requires that "the area . . . shall be permanently reserved as a wilderness, and no development for the project or plan for the entertainment

of visitors shall be undertaken which will interfere with preservation intact of the unique flora and fauna and the essential primitive natural conditions now prevailing in this area." 16 U.S.C. § 410c. Section 410b qualifies that mandate, specifically reserving rights to the Seminole Nation: "nothing in Sections 410 to 410c . . . shall be construed to lessen any existing rights of the Seminole Indians *which are not in conflict with the purposes for which the Everglades National park is created.*" 16 U.S.C. § 410b (emphasis added). Section 410b further states that the Park Service must manage the Park subject to the provisions of 16 U.S.C. § 1. *Id.*

The Everglades region, including WCA 3A, also is subject to the provisions of the Central and Southern Florida Project for Flood Control and Other Purposes (the "C&SF Project"). Viral Decl. at ¶ 4. Congress established the C&SF Project, which included the area that later became WCA 3A, in The Flood Control Act of 1948. Pub. Law No. 80-858, 62 Stat. 1171 (1948). *See also* The Flood Control Act of 1954, Pub. Law No. 83-780, 68 Stat. 1256 (1954); The Flood Control Act of 1968, Pub. Law No. 90-483, 82 Stat. 739 (1968). The Corps operates the C&SF Project. Viral Decl. at ¶¶ 4, 5, 8.

The flood control acts established three interconnecting reservoirs, known as Water Conservation Areas, that total about 1,350 square miles in Dade, Broward and Palm Beach counties. *Id.* at ¶¶ 4-10. The reservoirs were created for several reasons: controlling flooding and water flow in Everglades National Park and surrounding areas; irrigating agricultural areas; directing water flow away from the developed, eastern seaboard of South Florida; and enhancing fish, wildlife and

recreation in and around the Park. *Id.* But the overall purpose was to help maintain the Everglades in its natural state. *Id.* at ¶ 4. Because of the varied goals of the C&SF Project, Congress gave the Corps broad discretion in how to operate it. *Id.* at ¶¶ 5, 8.

To implement the Project, the Corps constructed an elaborate network of water control structures, including canals, spillways, levees, culverts, and pumping stations. *Id.* at ¶¶ 4-14. Operating criteria and schedules for the three Water Conservation Areas are spelled out in the October 1992 Water Control Plan for Water Conservation Areas-Everglades National Park and ENP-South Dade Conveyance System. *Id.* at ¶ 8. The schedules include detailed instructions on operating project spillways. *Id.* The schedules control water flow during the wet and dry seasons, and are designed to preserve vegetation, fish and wildlife in the Water Conservation Areas. *Id.*

The operating criteria for WCA 3A are set out in the June 1993 Final Environmental Assessment for the Experimental Program of Water Deliveries to Everglades National Park ("the Environmental Assessment"). *Id.* at ¶¶ 11-15; P.I. Order at 6.[4] The criteria contain schedules of when certain spillways and levees are to be opened and closed to control the flow of water into WCA 3A, and out of the area into Everglades National Park. *Id.* at ¶14. For example, the regulations specify that one set of structures, known as S-333, are to be closed when water levels at a downstream trigger well are above

4. This Court approved the Environmental Assessment in prior litigation. *See South Dade Land Corp. v. United States, No.* 93-2210-CIV-DAVIS (S.D. Fla. 1993).

6.8 feet, and are to be opened when the levels fall below 6.8 feet. *Id.* at ¶ 18.

The SFWMD is the Corps' local sponsor and operator of the C&SF Project. Mierau Aff. at ¶3. The District runs the various water control structures according to the Corps operating criteria. *Id.* However, the Corps directly controls the primary water control structures in the Water Conservation Areas, including a series of structures known as S-12 that regulate water flow out of WCA 3A. *Id.* at ¶¶ 3, 4.

Roughly two-thirds of the Tribe's Federal Reservation and the entire Leased Area are located within WCA 3A and the C&SF Project, and thus are subject to the Congressionally established authority of the Corps and the District to operate the Project. *See* Discussion, Section B *supra.* In addition, the Settlement Agreement and the Lease subject the Tribe to the authority of the Corps and the District to administer the C&SF project. *Id.* The Permit Area is located within the boundaries of Everglades National Park, and thus is subject to the Park Service's Congressionally established mandate to run the Park. *Id.*

D. *Flooding Before Tropical Storm Gordon*

During September and October of 1994, the Water Conservation Areas received 14.71 inches of rain, five inches above normal. Duncan Aff. at ¶2.[5] This resulted in the highest

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5. The heavier-than-normal rainfall began in May 1994. Khanal Aff. at ¶ 4. Between May and October 31, 1994, parts of WCA 3A

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surface water levels recorded since 1947 in the Everglades. Ex. E to Response. The heavy rains flooded tribal land throughout the Federal Reservation, the Leased Area and the Permit Area. Terry Aff. at ¶2. The flooding was so severe that on September 29, 1994, public access to WCA 3A was closed. *Id.* at ¶ 7. The high water also forced the tribe to close the Federal Reservation to the public. *Id.*

The flooding was not limited to tribal land. During this time, six to twenty inches of water covered the entrance, parking lot and other areas of the Everglades National Park Shark Valley Visitors Center. Doren Decl. at ¶ 7. The high water forced Park officials to close Shark Valley for several days in late October and early November. Belli Decl. at ¶3. The rains also affected the Park's Chekika Recreation Area east of Shark Valley. *Id.* at ¶ 2(e). In addition, there was localized flooding in other areas of the Park, as well as in adjacent developed areas. Doren Decl. at ¶5, Johnson Decl. at ¶ 7 (Section 1). Some of the Park flooding was due to a decision by the Corps and the District to release water from WCA 3A into the Park in an attempt to reduce high water in the conservation area. Doren Decl. at ¶ 5.

In mid-October, tribal officials began requesting emergency relief from state and federal authorities. Duncan Aff. at ¶ 3; Cortinas Aff. at ¶ 2. Even before that, Park officials had taken steps to relieve flooding in the WCA 3A. Johnson Decl. at ¶¶ 1-5 (Section 1). After consulting with Corps and

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received 52 inches of rain, 10 inches between normal. *Id.* As a result, WCA 3A recorded an all-time-high water level from mid-October through the beginning of November. Mierau Aff. at ¶ 5.

District officials, Park authorities in early September approved opening the S-12 structures to increase water flow out of WCA 3A into the western Shark Slough basin. *Id.* at ¶ 4.[6]

On October 17, 1994, several tribal officials, including Water Resources Director Truman Duncan and attorney Angel Cortinas, met with the District's Deputy Executive Director, Michael Slayton. Duncan Aff. at ¶ 3; Cortinas Aff. at ¶ 2. They told Slayton they needed emergency help to alleviate the flooding. *Id.* Slayton suggested that the District could reduce water levels by increasing water flow out of WCA 3A through the S-12 and the S-333 structures, but indicated he needed authorization from the Corps and Park officials to do so. Duncan Aff. at ¶ 3. The following day, Duncan spoke to several Corps officials about the problem. *Id.* at ¶ 4. The Corps did not want to increase water flow through the S-333 structures because it would increase flooding throughout western and southern Dade County. *Id.* However, Corps officials suggested that they could increase water flow out of WCA 3A by cutting weeds and other vegetation behind the S-12 structures. *Id.*

On October 19 and 20, Cortinas met with several Corps and District representatives to reiterate the need for immediate action. Cortinas Aff. at ¶ 3. On November 3, the Bureau of Indian Affairs wrote to Defendant West on behalf of the Tribe, requesting that Park officials authorize the Corps to remove

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6. At about the same time, the Park closed the S-333 structures because of flooding in the East Everglades. This reduced the water flow out of WCA 3A and partially negated the effect of opening the S-12 structures. Johnson Decl. at ¶ 3 (Section 1).

the vegetation behind the S-12 structures and open the gates to another water control structure known as L-67. Ex. E to the Response. The letter indicated that the Corps supported both ideas, but that Park officials had to approve because the S-12 and L-67 structures were on Park land. *Id.* The Florida Game and Fresh Water Fish Commission also supported both requests. Ex. I to Response (Letter from the Commission's Executive Director to Defendant Ring).

On November 4, Cortinas wrote to West about the problem, and on November 7 he talked to her on the telephone. Cortinas Aff. at ¶¶ 5, 6. The record does not indicate how West responded, although Cortinas claims that on November 14 he was "advised that Defendants West and Ring did not want to deal with the Tribe's flooding emergency." *Id.* at ¶ 9.

Park officials opposed removing the vegetation behind the S-12 structures because of concerns that increasing water flow into the Park would adversely affect water quality, vegetation and wildlife. Johnson Decl. at ¶ 9 (Section 1). The Corps operating criteria prevented it from opening the S-333 structures because of high water levels downstream. *Id.* at ¶¶ 18-21; Mierau Aff. at ¶ 10.

But Tribe requests for help did not go entirely unheeded. The Corps and the District took several steps to try to relieve flooding in WCA 3A. They reduced the release of water from Lake Okeechobee into canals that carry it through WCA 3A and the Park en route to Florida Bay, and increased water releases from the Conservation Areas into populated areas to the east. Ex. I to the Response; Mierau Aff. at ¶¶ 7-9; Vearil

Decl. at ¶¶ 15-18. In addition, during the week of November 14, the Corps placed two temporary berms at the eastern and western ends of the Permit Area to try to reduce water flow into the area. Doren Decl. at ¶ 8. The Corps also installed two pumps to push water out of the area. *Id.* This reduced flooding in the Permit Area, and *increased* it in Shark Valley. *Id.* Finally, beginning in early October, the Corps allowed tribal members to add fill material to raise the elevation of their houses, driveways, and government and business buildings. Belli Decl. at ¶ 4.

E. Tropical Storm Gordon and the Aftermath

From November 15-17, 1994, Tropical Storm Gordon soaked South Florida with torrential rains, producing a fifty-year flood in the Everglades area. Khanal Aff. at ¶6.[7] As a result, WCA 3A received between 9 and 16.82 inches of rain during November, compared with a normal average of 1.75 to 2 inches. *Id.* This extensive rain exacerbated the already-severe flooding problems in WCA 3A, the Park, and the surrounding area. *See, e.g.*, Affidavits of Duncan, Terry, and F.K. Jones; Declarations of Belli and Johnson.

Gordon was nearly catastrophic for the Tribe. *See,* e.g., Affidavits of Duncan, Terry, F.K. Jones, and Cortinas. In the Permit Area, the Miccosukee Indian Village was under water, the principal tribal road was flooded, and the Indian chickees were inundated. Duncan Aff. at ¶ 10. Many tribal members had to evacuate their homes. Ex. G to Response (Letter from Cortinas to Interior Department Assistant Secretary Bonnie

7. A 50-year flood means that a flood of similar magnitude is expected to occur only once every 50 years. Khanal Aff. at ¶ 6.

Cohen). The tribal village, which contributes significantly to the Tribe's economic livelihood, was closed to the public. *Id.*

The flooding also devastated the tree islands in WCA 3A. Terry Aff. at ¶¶ 7-11. Blue and green algae covered soil where tribal members traditionally plant their corn and conduct their religious ceremonies. *Id.* at ¶ 8. As a result, tribal members could not engage in the traditional spring planting ceremony in February and March of 1995. *Id.* They also were unable to plant other crops. *Id.* at ¶ 7. The islands and trees were severely damaged, and may not recover for several generations. *Id.* at ¶ 10. More than a foot of water flooded chickees in the islands. *Id.* at ¶ 7.

As with the flooding before Gordon, damage was not limited to tribal land. Numerous other areas in and around Everglades National Park were flooded. Johnson Decl. at ¶¶ 17, 20, 22 (Section 2); Doren Decl. at ¶5; Belli Decl. at ¶ 9. More than fifteen inches of water covered much of Shark Valley. Belli Decl. at ¶ 3(a). Park officials had to close it from November 15, 1994, through February 22, 1995. *Id.* They also had to close the Chekika Recreation Area. *Id.* at ¶ 3(c). Eleven park employees were forced to evacuate their homes. *Id.* at ¶ 9(e). A number of Park facilities had to be closed to the public, and the Park lost hundreds of thousands of dollars in revenue. *Id.* at ¶ 9.

Many white-tailed deer and other wildlife either drowned or died due to malnutrition. F.K. Jones Aff. at ¶¶ 6-10; Snow Decl. at ¶¶ 3-7. Some experts estimated that eighty-five percent of the deer herd died, and that it will take a decade

before the herd regains its pre-flood numbers. F.K. Jones Aff. at ¶ 8. Breeding habits of birds, alligators and other wildlife were threatened, including the endangered Cape Sable Seaside Sparrow. Snow Decl. at ¶ 8; Fleming Decl. at ¶¶ 2-4.

On the same day that Gordon struck, the Tribe held a telephone conference with federal and state officials and renewed its request for emergency flood relief. Duncan Aff. at ¶ 8; Cortinas Aff. at ¶ 10. The Tribe again asked that Park officials authorize cutting the vegetation behind the S-12 structures. *Id.* Defendants Ring and West rejected this idea. *Id.*[8] Tribe officials indicated that West said that "the Tribe had a diminished status and lesser flood protection rights because the land where tribal members lived is a permit area in Everglades National Park." Duncan Aff. at ¶ 8; Cortinas Aff. at ¶10; F.K. Jones Aff. at ¶ 4.

As a result of the November 15, 1994 telephone meeting, representatives of the Park, the Bureau of Indian Affairs, the Corps and the District held a conference call on November 17 to discuss solutions to the Tribe's flooding problems. Johnson Decl. at ¶ 13 (Section 1) and ¶ 1 (Section 2). This was one of several telephone meetings held from November 15-18 to discuss flood relief. Belli Decl. at ¶ 5. As a result, the federal government agreed to some Tribe requests: (1) to

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8. Several tribal officials indicated that the District and the Corps favored cutting the vegetation. Duncan Aff. at ¶ 8; Cortinas Aff. at ¶ 10; F.K. Jones Aff. at ¶ 4. However, Terry Rice, the Corps' District Engineer, said that neither he nor his employees ever took a position on whether the vegetation should be cut. Rice Decl. at ¶ 4. Rice said he told tribal officials only that cutting the vegetation would increase water flow through the area. Id. at ¶ 3.

continue adding fill to raise the elevation of tribal houses and driveways (Belli Decl. at ¶ 5(a)); (2) to construct the two temporary berms discussed in Section D *supra* (*Id.* at ¶ 5(b)); (3) to open two extension canal gates, S-346 and S-347, to improve water flow out of WCA 3A and into the Park (*Id.* at ¶¶ 5(d), 8); and (4) to send two government surveyors and surveying equipment to help determine how to best elevate tribal houses and government buildings (*Id.* at ¶ 7).

On November 18, 1994, tribal attorney Cortinas wrote a five-page letter to Interior Department Assistant Secretary Bonnie Cohen, reiterating the Tribe's requests to open the S-333 gates and cut the S-12 vegetation. Ex. G to Response. On November 21, tribal officials again met with District and Corps representatives. Duncan Aff. at ¶11; F.K. Jones Aff. at ¶10. The District and the Corps agreed that removing the S-12 vegetation would relieve flooding. *Id.*[9] However, Park officials continued to oppose cutting the vegetation. *Id.*

The S-333 gates were not opened because downstream water levels were too high, according to the Corps' operating criteria. Doren Decl. at ¶ 21 (Section 2); Mierau Aff. at ¶10. Water levels at the downstream triggering points did not drop below the mark where the criteria allow the S-333 gates to be opened until March 21, 1995. Doren Decl. at ¶ 21 (Section 2); Mierau Aff. at ¶ 10. Once the gates were opened on March

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9. Tribal officials indicated that Park authorities were supposed to attend the meeting, but showed up "several hours late." Duncan Aff. at ¶ 11. Park officials said they were never told when the meeting would be held. Belli Decl. at ¶6. Two Park officials did meet with Terry and Duncan later the same day. Doren Decl. at ¶10.

21, water levels decreased two to three inches within a day. *Id.*

To support its request to cut the S-12 vegetation, the Tribe gave federal officials a 1968 study of plant cutting behind the S-12 structures conducted by the U.S. Geological Survey. Duncan Aff. at ¶ 11. The vegetation cut in 1968 was primarily sawgrass, while the plants that the Tribe wanted cut in 1994 were much more varied. Ex. D to Duncan Aff.; Duncan Aff. at ¶ 14; David Jones Decl. at ¶ 4.[10] According to the 1968 study, water flow through the S-12 structures temporarily increased by fifteen percent after the Corps cut the plants, but then dropped. Ex. D to Duncan Aff.[11]

The Tribe indicated it would not use herbicides or pesticides to remove the vegetation behind the S-12 structures. Duncan Aff. at ¶ 19. Instead, officials planned to use a mechanical, weed harvester that would cut the vegetation just above ground level so as to not disturb the

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10. The Tribe and Park officials differ on the nature of the plants in question. Duncan Aff. at ¶14; David Jones Decl. at ¶ 4. Tribe scientists say that the vegetation is made up of nonnatural plants such as cattails, yellow water lily, Carolina willow, and climbing hempweed. Duncan Aff. at ¶ 14. Park scientists say it is comprised of native plant species such as bayheads, willowheads, pond apple, willow, common cattail, lether fern and spatterdock. David Jones Decl. at ¶ 4.

11. The parties differ on the conclusions to be drawn from this study. The Tribe believes it shows the benefits of cutting vegetation behind the S-12 structures. Duncan Aff. at ¶ 11. The Federal Defendants say that the study was inconclusive at best. Doren Supp. Decl. at ¶ 1.

soil. They then planned to recover the plants before they flowed downstream. *Id.*

Despite these precautions, Park officials turned down the Tribe's request because they feared cutting the vegetation would seriously harm Park water, plants and wildlife. Doren Decl. at ¶12; Snow Decl. at ¶¶ 2, 6-12; Fleming Decl. at ¶¶ 2-7; Doren Supp. Decl. at ¶¶ 2-3; Ronald Jones Decl. at ¶¶ 4-8. For example, they thought cutting the vegetation would increase the flow of nutrients downstream, which would pollute Park water. Doren Decl. at ¶ 12; Doren Supp. Decl. at ¶¶ 2-3; Ronald Jones Decl. at ¶¶ 4-8. It could also increase water flow downstream, thereby prolonging flooding in the Park. Snow Decl. at ¶2. The higher levels of polluted water could destroy sawgrass marshes and other native plants in the Park. Doren Decl. at ¶12; Snow Decl. at ¶ 5. The high water levels also would destroy habitats for alligators, white-tailed deer, the endangered Cape Sable Seaside Sparrow, the endangered Florida Panther and other wildlife. Doren Decl. at ¶ 12; Snow Decl. at ¶ 5. As a result, breeding could be curtailed. Doren Decl. at ¶12; Snow Decl. at ¶ 5.

Furthermore, in 1993 Park officials had agreed to a District request to cut vegetation behind S-332, a structure similar to S-12. Doren Decl. at ¶11. District officials had thought that cutting the vegetation would increase water flow from the north into the Park. *Id.* However, there was no noticeable change in water flow after the District cut the vegetation. *Id.* But the volume of sediment, plant debris and other pollutants flowing into the Park increased. *Id.* at ¶¶ 11-12. Park officials thought the same thing would happen if they cut the S-12 vegetation. *Id.*

Appendix B

DISCUSSION

I. THE STANDARD OF REVIEW

A moving party is entitled to summary judgment only where no genuine issue of material fact exists and the party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). On a motion for summary judgment, a court must view all the evidence in a light most favorable to the non-moving party. *Samples ex rel. Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). All reasonable doubts as to the facts are to be resolved in favor of the party opposing summary judgment. *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991). If a reasonable fact finder evaluating the evidence could draw more than one inference from the facts, and if that inference introduces a genuine issue of material fact, then the court should not grant summary judgment. *Augusta Iron and Steel Works v. Employers Ins. of Wausau*, 835 F.2d 855, 856 (11th Cir. 1988).

While the burden on a party seeking summary judgment is great, the opposing party has a duty to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). A mere sliver of evidence in favor of the party opposing the motion, or evidence that is merely colorable or not significantly probative, is insufficient to defeat a properly supported motion. *Id.* Despite the presumption in favor of the non-moving party, the Court must bear in mind that the purpose of Rule 56 is to eliminate the needless delay and expense of unnecessary trial. *Celotex*, 477 U.S. at 322-23.

Appendix B

II. THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT IS ENTITLED TO ELEVENTH AMENDMENT IMMUNITY

The District argues that the Court should grant summary judgment in its favor because it is a Florida state agency, and therefore is entitled to immunity from suit in federal court under the Eleventh Amendment to the United States Constitution. The Court agrees.[12]

The Eleventh Amendment bars suits by citizens of a state or foreign country against states in federal court.[13] The states' immunity from suit specifically extends to Indian tribes. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). The Tribe argues that the Eleventh Amendment does not apply to lawsuits seeking injunctive relief,[14] but case law does not support this contention. The Eleventh Amendment applies to lawsuits seeking injunctive and other equitable relief as well as money damages. *Seminole Tribe of Fla. v. Florida,*

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12. The District also argues that the Court should grant summary judgment because the agency shares immunity from suit with the Federal Defendants under the Flood Control Act of 1948. *See* 33 U.S.C. § 702c. The Court does not address issue because of its ruling on the Eleventh Amendment argument.

13. Although by its terms the amendment bars only suits by citizens of one state against another state, the Supreme Court has construed the amendment to bar suits by citizens of a state against their own state government. *Hans v. Louisiana*, 134 U.S. 1 (1890).

14. The Tribe's lawsuit seeks both damages and an affirmative injunction.

116 S.Ct. 1114, 1124 (1996); *Pennhurst State Sch. & Hosp. v. Haldernian*, 465 U.S. 89, 100-01 (1984).[15]

The Eleventh Circuit Court of Appeals has identified several factors for courts to consider in determining whether a political subdivision such as the District is an arm of the state protected by the Eleventh Amendment: (1) how state law defines the entity, (2) the agency's fiscal autonomy, (3) what degree of control the state maintains over the agency, (4) where the entity derives its funds, and (5) who is responsible for judgments against it. *Robinson v. Georgia Dept. of Transp.*, 966 F.2d. 637, 638 (11th Cir.), *cert. denied*, 506 U.S. 1022 (1992); *Tuveson v. Florida Governor's Council on Indian Affairs*, 734 F.2d 730, 732 (11th Cir. 1984); *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d. 1518, 1520 (11th Cir. 1983). These factors suggest that the District is a state agency.

On the first factor, a primary consideration is how state courts have treated the agency. *Tuveson*, 734 F.2d. at 732. Florida courts have treated the District as a state agency in determining that it was immune from suit in state court under traditional sovereign immunity principles. *South Fla. Water Management Dist. v. Taylor*, 676 So.2d 11 (Fla. 3d DCA 1996). Turning to the second factor, the fact that an agency

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15. The Supreme Court did not, as the Tribe argues, limit Eleventh Amendment immunity to lawsuits seeking damages in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30 (1994). The *Hess* Court merely reiterated a long-standing principle that courts must consider whether state treasuries are liable for judgments in determining whether particular agencies are entitled to Eleventh Amendment immunity. 513 U.S. at 47-49.

submits its budget to the state for approval suggests it is an arm of the state. *Robinson*, 966 F.2d at 638 (Georgia Department of Transportation was entitled to Eleventh Amendment immunity in part because it submitted its budget to the state for approval). In Florida, each of the state's five water management districts must submit its annual budget and expense report to the governor, who then may approve or disapprove the budget, in whole or in part. Fla. Stat. §§ 373.507, 373.536(a).

On the third factor, the state exercises a high degree of control over all water management districts. Not only does the governor have final say over their budgets, but state law defines the powers that the districts have, Fla. Stat. §§ 373.103, 373.308, 373.309, and 373.333; state auditors may audit each district's accounts, Fla. Stat. § 373.589; and the state must review and approve all rules that the districts promulgate. Fla. Stat. §§ 373.114, 373.427, and 373.455.

As to the fourth factor, the Tribe correctly notes that under Florida law, the District is authorized to levy *ad valorem* property taxes. The Florida Constitution specifically prohibits state agencies from levying those taxes. *See* Fla. Const. art. VII, § 1. However, Section 9 of Article VII allows agencies to levy *ad valorem* property taxes for water management purposes, and Florida courts have upheld the constitutionality of water management districts levying such taxes. *St. Johns River Water Management Dist. v. Deseret Ranches Fla., Inc.*, 421 So.2d 1067, 1070 (Fla. 1982) (water management districts may levy *ad valorem* taxes even though they serve a state purpose as long as they also serve a local purpose). On the fifth factor, no party has submitted evidence showing whether the state must satisfy judgments against the District.

Thus, the factors that the Eleventh Circuit has identified as important in determining whether an entity is an arm of the state weigh in favor of finding that the District is a state agency. Following *Robinson, Tuveson,* and *Fouche,* this Court finds that for the reasons listed above, the District is entitled to Eleventh Amendment Immunity. *Accord Indian Trails Water Control Dist. v. South Fla. Water Management Dist., No.* 96-8598-CIV-RYSKAMP (S.D. Fla. Dec. 12,1996).

The Tribe next argues that the District waived any Eleventh Amendment immunity claims by participating in a federal program — operation of the C&SF Project for the Corps. The Tribe relies on *Parden v. Terminal Ry. Of Ala. State Docks Dept.,* 377 U.S. 184 (1964), for this proposition. *Parden* held that the state of Alabama waived its Eleventh Amendment immunity by acting as a railway employer under a federal law in which Congress authorized lawsuits against *any* participating employer. *Id.* at 194-98.

The Tribe's reliance on *Parden* is misplaced for two reasons. First, the Supreme Court in *Welch v. Texas Dept. of Highways,* 483 U.S. 468 (1987), overruled *Parden's* holding that states may impliedly consent to suit by participating in federal programs. Under *Welch,* Congress may abrogate the Eleventh Amendment and subject states to lawsuits in federal court only if it does so in unmistakably clear language. *Id.* at 475. Second, in *Edelman v. Jordan,* 415 U.S. 651, 678 (1974), the Supreme Court held that the state of Illinois had not waived its immunity to suit by participating in a federal public aid program: "The mere fact that a State participates in a program through which the Federal Government provides assistance . . . is not sufficient to establish consent on the

part of the State to be sued in the federal courts." *Id.* at 673. Following *Welch* and *Edelman*, the Court finds that the District did not waive its Eleventh Amendment immunity by operating the C&SF Project for the Corps. Accordingly, the Court will grant summary judgment in favor of the District on Counts II, IV, and VI.

III. THE FEDERAL DEFENDANTS DID NOT BREACH THEIR DUTY OF TRUST TO THE TRIBE

The Court must next decide whether the Federal Defendants are entitled to summary judgment on the Plaintiffs' breach of trust (Count V), due process (Count III), and equal protection (Count I) claims.

It is undisputed that there is a general trust relationship between the United States and Native American tribes. *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The Supreme Court has repeatedly emphasized the "distinctive obligation of trust incumbent on the Government in its dealings with these dependent and sometimes exploited people." *Eg.*, *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). The United States often serves in a fiduciary capacity when dealing with Native Americans, and "as such, it is duty bound to exercise great care in administering its trust." *United States v. Mason*, 412 U.S. 391, 398 (1973).

The Tribe, citing these well-established tenets, argues that the Federal Defendants had a fiduciary obligation to accede to its requests to cut the vegetation behind the S-12 structures and open the S-333 gates. However, despite the general trust obligation of the United States to Native

Americans, the government assumes no specific duties to Indian tribes beyond those found in applicable statutes, regulations, treaties or other agreements. *Mitchell*, 463 U.S. at 224 (Tucker Act and accompanying regulations established duty of federal government to manage Indian timber for the benefit of a tribe); *Vigil v. Andrus*, 667 F.2d 931, 934 (10th Cir. 1982) ("the federal government generally is not obligated to provide particular services or benefits in the absence of a specific provision in a treaty, agreement, executive order, or statute"); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379 (1st Cir. 1975) (rejecting the notion of "some sort of overly general fiduciary relationship, unlimited and undefined," between the Interior Department and the tribe, and holding that "[a] fiduciary relationship . . . must indeed be based upon a specific statute, treaty or agreement which helps define and, in some cases, limit the relevant duties"); *Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1486-87 (D. Ariz. 1990), *aff'd sub nom., Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir. 1991); *cert. denied*, 503 U.S. 959 (1992) ("[i]t is equally clear that the federal government is not obligated to provide particular services or benefits, nor to undertake any specific fiduciary responsibilities in the absence of a specific provision in a treaty, agreement, executive order, or statute").

Before determining whether the Federal Defendants violated any fiduciary obligations to the Tribe, the Court must first ascertain what, if any, duties were imposed on the Defendants by the applicable statutes, treaties, regulations and agreements. Only after determining the scope of the government's duties can the Court determine whether the Defendants breached them.

Appendix B

There are several applicable statutes and agreements: the Lease, the Settlement Agreement, the Special Use Permit, the National Park Service Organic Act, the Everglades National Park Act, the C&SF Project, and the various court-approved Corps operating criteria. *See* Sections B and C *supra*. The Tribe has not introduced evidence that the Federal Defendants assumed a duty under any of these statutes and agreements to provide the Tribe with the flood relief it has requested in this case.[16] In contrast, the Federal Defendants have produced evidence showing that according to these statutes and agreements, they had the authority to deny the Tribe's requests to cut the S-12 vegetation and open the S-333 gates.

All three areas of tribal land at issue are subject to an applicable statute or agreement giving the Federal Defendants broad discretion to manage the land. For example, the majority of the Federal Reservation and all of the Leased Area are located within WCA 3A, which is part of the C&SF project. Congress gave the Corps broad discretion to manage the C&SF Project. Vearil Decl. at ¶¶ 5, 8. Furthermore, as discussed in Section C *supra*, the Lease and Settlement Agreement subject the Tribe's rights in the Leased Area to the Corps' authority to raise and lower water levels within WCA 3A. Lease at ¶ 6. Thus, the only duty that the Corps assumed towards the Tribe was to manage the area pursuant

16. The Tribe states that the Federal Defendants violated their fiduciary duties by deliberately flooding tribal lands. However, the Federal Defendants did not *act* to flood tribal lands. Excessive rainfall over several months caused the flooding. Rather, it is the Federal Defendants' *inaction* — their refusal to cut the S-12 vegetation and open the S-333 gates — that the Tribe, in reality, disputes.

to its authority under the C&SF Project and accompanying operating criteria.

The Federal Defendants produced evidence showing that the Corps did not open the S-333 gates until March 21, 1995, because (1) the Corps operating criteria specified that the gates stay closed until water levels downstream had dropped below certain levels, and (2) water did not drop below those levels until March 21. *See* Vearil and Mierau Affidavits, Doren Declaration, and Ex. A to the District's Reply (the 1993 Environmental Assessment). The Tribe offered no evidence to the contrary. Although the Corps' decision may have exacerbated flooding on tribal land, the undisputed evidence shows that it was made in accordance with the WCA 3A operating criteria. Accordingly, the Corps violated no duty towards the Tribe in keeping the S-333 gates closed until March 21, 1995.

The Tribe's claims also relate to the Permit Area located along the northern edge of Everglades National Park. As previously noted, the Special Use Permit allowing the Tribe to occupy the 333-acre tract is subject to the applicable federal statutes giving the Park Service discretion in operating the Park. Attach. 15 to Federal Defendants' Proposed Finding of Uncontroverted Fact at ¶ 22. In addition, because the S-12 structures are located in Everglades National Park, the Park Service had to approve or deny the Tribe's request to cut the vegetation. The Everglades National Park Act prioritizes preserving, the Park's natural, wilderness-like state, including its unique flora and fauna. 16 U.S.C. § 410c. The Act also incorporates the general purposes of the National Park Service Organic Act, which makes conserving scenery, nature and

wildlife the main goal of all national park management. 16 U.S.C. § 410b, 16 U.S.C. § 1. The Everglades Act provides for the rights of the Miccosukee Indians by stating that nothing in the Act "shall be construed to lessen any existing rights of the Seminole Indians *which are not in conflict with the purposes for which the Everglades National Park is created.*" 16 U.S.C. § 410b (emphasis added). The emphasized language qualifies the Tribe's rights by giving priority to overall management of the Park.

In addition to the Everglades Act's limits on the Tribe's rights in the Park, the Interior Department has broad discretion in determining how best to protect public lands, weigh competing uses of federal property, and allocate park resources. *Organized Fishermen of Fla. v. Hodel*, 775 F.2d 1544, 1550 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Bicycle Trails of Marin v. Babbitt*, 82 F.3d 1445, 1454 (9th Cir. 1996); *Sierra Club v. Andrus*, 487 F. Supp. 443, 448 (D.D.C. 1980), *affd sub nom., Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981). Therefore, under the applicable laws, the only duty the Park Service had to the Tribe was to uphold its rights insofar as they did not conflict with overall park purposes.

The Federal Defendants produced evidence showing that removing the S-12 vegetation could harm Park water quality, plants, and wildlife. Again, the Tribe has produced no evidence to the contrary.[17] Congress authorized the Park

17. The affidavit of Truman Duncan stating that "I . . . am convinced that the vegetation removal would have no adverse water quality impact on Everglades National Park," does not raise a factual

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Service to weigh competing interests when it set forth Park purposes and Seminole Nation rights in the Everglades Act. Under very similar circumstances, the Supreme Court held that the United States did not breach a fiduciary duty to another Indian tribe. *See Nevada v. United States*, 463 U.S. 110, 128 (1983) (the government did not breach any fiduciary duty to the Paiute Tribe when it represented both tribal and water management district's interests in a water rights lawsuit: "The Government cannot follow the fastidious standards of a private fiduciary, who would breach his duties to his single beneficiary solely by representing potentially conflicting interests without the beneficiary's consent. The Government does not compromise its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.").

In this instance, Congress mandated that the Park Service weigh tribal and Park interests. Given Park officials' mandate to protect park resources, their broad discretion to carry out the mandate, and their concern that cutting the S-12 vegetation would harm water quality, plants and wildlife, the decision not to cut the vegetation breached no duty towards the Tribe. Accordingly, the Court will grant summary judgment in favor of the Federal Defendants on Count V.

(Cont'd)
issue sufficient to avoid summary judgment. A mere sliver of evidence is insufficient to defeat a properly supported summary judgment motion. *Anderson supra*, Section I, 477 U.S. at 252.

Appendix B

IV. THE FEDERAL DEFENDANTS HAVE NOT VIOLATED THE PLAINTIFFS' DUE PROCESS RIGHTS

The Plaintiffs claim the Federal Defendants violated their right to due process of law under the Fifth Amendment to the U.S. Constitution. They assert violations of two specific rights: to enjoy their tribal lands and to freely practice their religion under the First Amendment to the Constitution. The Court will address each argument in turn.

A. *The Right to Enjoy Tribal Lands*

To succeed on this claim, the Plaintiffs must show that the Federal Defendants deprived them of a constitutionally protected property interest for an improper motive and by arbitrary, capricious and pretextual means. *Reserve, Ltd., v. Town of Longboat Key,* 17 F.3d 1374, 1379 (11th Cir. 1994), *cert. denied*, 513 U.S. 1080 (1995). Therefore, the first question the Court must determine is whether the flood relief the Plaintiffs seek in this case is a constitutionally protected property interest.

Property interests may be created by the Constitution itself. *Wright v. Lovin,* 32 F.3d 538, 540 (11th Cir. 1994). They also may be created by independent sources, such as state or federal law, and contracts or unwritten agreements among parties. *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577 (1972). To have a property interest in a benefit, a person must have more than a need for or expectation of it. *Id.* He must have a legitimate claim of entitlement to it. *Id.* In addition, the Due Process Clause of

the Fifth Amendment generally confers no *affirmative* right to government aid, even where such aid may be necessary to secure life, liberty, or property interests. *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 196 (1989). Rather, the Clause acts as a *constraint* on governmental power to act. *Id.*

As discussed in Note 19 *supra*, the Tribe asserts that the Federal Defendants failed to act to provide flood relief to its members. To support its claim that this violated a property interest, the Tribe argues that this case falls into a narrow exception to the general rule that the Due Process Clause puts no burden on the government to take action. In certain limited circumstances, by virtue of a special relationship between the government and a party, the Constitution imposes affirmative duties of care and protection on the government. *E.g.*, *DeShaney*, 489 U.S. at 198; *Wooten v. Campbell*, 49 F.3d 696 (11th Cir.), *cert. denied*, 116 S.Ct. 379 (1995).

The Tribe contends that by virtue of the general trust relationship between the United States and Native Americans, it and the government have the type of special relationship that imposes affirmative obligations on the Federal Defendants. This is the same argument the Tribe made to support its breach-of-trust claim. As discussed in Section III *supra*, the general trust relationship does not give rise to an affirmative duty by the government to act. The only duties the Federal Defendants assumed were those delineated by the applicable laws and agreements. As discussed above, those laws and treaties imposed no obligation on the Defendants to open the S-333 gates and cut the S-12 vegetation.

In addition, the special relationship exception applies only to *liberty* interests, not *property* interests. The special relationship that forces the government to act applies only in situations where the government has taken a person into custody and has deprived him of the ability to care for himself. *DeShaney*, 489 U.S. at 199-200. Under those circumstances, the government assumes some responsibility to provide for that person's safety and general well-being. *Id.* However, the special relationship has been narrowly construed. *See Collins v. City of Harker Heights*, 503 U.S. 115, 127-28 (1992), *citing Bell v. Wolfish*, 441 U.S. 520 (1979) (government must satisfy certain minimal standards for pretrial detainees); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (same for persons confined in mental institutions); *Turner v. Safley*, 482 U.S. 78 (same for convicted felons).

The Tribe has not alleged, nor has the evidence shown, that the Federal Defendants so restrained tribal members' liberty that they were unable to care for themselves. Furthermore, the Tribe has not pointed to any authority standing for the proposition that a property interest may give rise to a special relationship of this type. Therefore, the Tribe has not asserted a property interest that would impose an obligation on the Federal Defendants to open the S-333 gates or cut the S-12 plants. Accordingly, there was no due process violation.

B. The Freedom of Religion Claim

The Plaintiffs' claim on this count is that by failing to alleviate flooding in the Leased Area, the Federal Defendants infringed on the Tribe's First Amendment right to freely

practice its religion. Specifically, the Tribe argues that it was unable to engage in its traditional spring corn-planting ritual because tree islands in the Leased Area were flooded.

The Tribe argues that the government's actions in this case should be subject to the strict scrutiny test of *Sherbert v. Verner*, 374 U.S. 398 (1963). Under that test, the government must have a compelling interest in its actions that overrides a party's right to freely practice its religion. However, before applying the strict scrutiny test, the Court must first determine whether the government's actions interfered with the Tribe's ability to practice its religion. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448-50 (1988). The Court concludes that the government did not interfere with the Tribe.

Under the Free Exercise Clause of the First Amendment, the government may not pass laws or take action that directly or indirectly coerce individuals into giving up religious practices. *Lyng*, 485 U.S. at 450-51. Nor can the government penalize individuals for attempting to practice their religion. *Id.* However, the Federal Defendants have not engaged in either practice. They did not attempt to penalize any tribal members who wished to undertake the spring corn planting ritual, nor take any action to pressure Tribe members into giving up the rite.

Viewing the facts in the light most favorable to the Tribe, as the Court must on a summary judgment motion, it appears that the government's failure to cut the S-12 vegetation and open the S-333 gates indirectly burdened the Tribe's ability to practice its religion in the Leased Area. Under the Supreme

Court's holding in *Lyng*, this does not require the Federal Defendants to justify their actions: "[The Free Exercise Clause] cannot and does not imply that incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Lyng*, 485 U.S. at 450-51. In other words, the First Amendment does not require the government to assist any group in the exercise of its religion. *Id.* at 45.

In *Lyng*, three Native American tribes challenged the U.S. Forest Service's decision to build a road across federal land that the tribes had historically used for religious worship. According to the complaint, construction would have interfered with the sanctity and tranquility necessary for worship. *Id.* at 442-43. The Supreme Court held that the government's decision to build the road was not an action that coerced the tribes into giving up their religious beliefs or penalized them for attempting to exercise those beliefs. *Id.* at 449. Citing *Bowen v. Roy*, 476 U.S. 693 (1986), the Court found that "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with religious beliefs of particular citizens." *Lyng*, 485 U.S. at 448 (internal quote marks omitted). The Court went on to state that "the Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Id.* (internal quote marks and citations omitted).

Lyng is directly applicable here. As *Lyng*, the government in this case took lawful actions to protect Park resources from harm. *See* Sections III and IV(A) *supra*. The fact that those actions burdened the Tribe's religious practice is not sufficient to require the government to provide a compelling justification. *See also Sequoyah v. Tennessee Valley Auth.*, 620 F.2d 1159 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980) (government decision to flood tribal lands for reservoir did not infringe on Cherokee Tribe's First Amendment rights).

The Tribe attempts to distinguish *Lyng* and *Sequoyah* by arguing that the Plaintiffs in those cases had no property rights to the land in question, whereas it does. But as the Court has already found, the Tribe's property rights were subject to the Federal Defendants' lawful authority to manage federal lands and operate the federal water management project. And as this Court held in its Preliminary Injunction Order and reiterated above, the Tribe long ago ceded any aboriginal title claims to the land. Thus, the Tribe's attempt to distinguish *Lyng* and *Sequoyah* on the basis of property rights fails. Because the Court finds that the Federal Defendants violated no due process rights of the Plaintiffs, the Court will grant summary judgment in favor of the Federal Defendants on Count III.

V. THE TRIBE'S EQUAL PROTECTION CLAIM FAILS

The Tribe asserts that the Federal Defendants violated its right to equal protection of the laws under the Fifth Amendment to the U.S. Constitution[18] because the Tribe is a

18. The Equal Protection Clause is part of the Fourteenth Amendment, which is enforceable only against the states. However, (Cont'd)

discrete and insular minority adversely impacted by the Defendants' decisions. Again, the Tribe argues that the government's actions are subject to strict scrutiny, and that the Federal Defendants must present compelling reasons to justify their decisions not to cut the S-12 vegetation and open the S-333 gates. However, before the Court applies strict scrutiny, it must first determine whether the government's decisions had a discriminatory purpose. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

On their face, the statutes and operating criteria the Federal Defendants used in deciding not to grant the two requests at issue are racially and ethnically neutral. That is, by their language, they do not require the government to discriminate against any particular group or individuals. The fact that a facially neutral law has a discriminatory impact does not alone trigger equal protection analysis. *Id.*; *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). The neutral law or policy is only unconstitutional if it can be shown to have a discriminatory purpose. *Feeney*, 442 U.S. at 272. Discriminatory purpose implies more than awareness of the consequences of an act. *Id.* at 279. It implies that the decision maker "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* The Court may infer discriminatory purpose from the totality of the circumstances, including *systematic* unequal application of

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(Cont'd)

the Supreme Court has held that the Fifth Amendment contains an equal protection component preventing the United States from invidiously discriminating between individuals and groups. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

a facially neutral law. *Davis*, 426 U.S. at 241-42 (emphasis added).

The Tribe has produced evidence showing that the Federal Defendants' decisions adversely impacted them by prolonging flooding on tribal land. However, it has not produced evidence showing that the Defendants made their decisions *because* they would prolong that flooding. The Tribe in its Response cites the following evidence as alleged proof of discriminatory purpose: Exhibit D at Paragraphs 8 and 11, Exhibit F at Paragraphs 4-12, Exhibit J at Paragraph 4, and Exhibit K at Paragraph 4. Paragraphs 4 of Exhibits J and K, Paragraph 8 of Exhibit D and Paragraph 10 of Exhibit F are identical:

> On November 15, 1994, I attended and participated in a telephonic conference between the Tribe and state and federal agencies to address the Tribe's flooding crisis. During the phone conference, the U.S. Corps of Engineers and the South Florida Water Management District stated that they favored removal of the vegetation along the S-12 structures. The Superintendent of Everglades National Park, Richard Ring, rejected this proposal. Barbara West supported Ring's refusal and added that the federal government's obligation was to Everglades National Park and not to the Miccosukee Tribe. Ms. West also remarked that the Tribe had a diminished status and lesser flood protection rights because the land where tribal members lived is a permit area in Everglades National Park.

The remaining paragraphs recite the Park Service's decisions to deny the Tribe's requests, despite the fact that several other agencies favored them.

This evidence does not raise a genuine factual issue on the subject of discriminatory purpose. The Federal Defendants have produced evidence showing non-discriminatory reasons for denying the Tribe's requests. *See* Section E *supra*. The Tribe has not shown that these reasons were a pretext for discrimination. West's statements do not prove an intent to discriminate. They merely recognize that the Tribe's property rights in this case are subject to the Park Service's duties to protect Park resources. See Sections III and IV(A) *supra*. Without a showing of discriminatory purpose, the Tribe cannot establish an equal protection violation. *Davis*, 426 U.S. at 242. Therefore, the Court will grant the Federal Defendants' summary judgment motion on Count 1.

CONCLUSION

For the foregoing reasons, the Tribe is not entitled to a Writ of Mandamus. Therefore, the Court also will grant summary judgment in favor of all defendants on Count VI. Accordingly, it is

ORDERED AND ADJUDGED that the Federal Defendants' Motion for Summary Judgment (D.E. # 45) is **GRANTED**. It is

FURTHER ORDERED AND ADJUDGED that Defendant South Florida Water Management District's Motion for Final Summary Judgment (D.E. # 51) is **GRANTED**. It is

Appendix B

FURTHER ORDERED AND ADJUDGED that the Motions of Individual Defendants West and Ring for Summary Judgment (D.E. # 47) are **DENIED AS MOOT**. It is

FURTHER ORDERED AND ADJUDGED that the Plaintiffs' Motion for Leave to File a Memorandum of Law (D.E. # 110) is **GRANTED**. It is

FURTHER ORDERED AND ADJUDGED that the Plaintiffs' Motion to Strike Notice of Filing (D.E.# 111) and the Plaintiffs' Motion to Foreclose Summary Judgment on the issue of Eleventh Amendment Immunity (filed July 8, 1997) are both **DENIED**. It is

FURTHER ORDERED AND ADJUDGED that the Federal Defendants' Motion to Strike Supplemental Affidavit of Truman Duncan (filed July 14, 1997) and the South Florida Water Management District's Motion to Strike Opposition Memorandum (D.E. # 102) are both **DENIED**.

DONE AND ORDERED in Chambers in Miami, Florida, this 31st day July, 1997.

s/ Edward B. Davis
EDWARD B. DAVIS
CHIEF UNITED STATES DISTRICT JUDGE

Copy: James Upton, Richard Montague, Dexter Lehtinen, Ruth Clements

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 27, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-5488

D.C. Docket No. 95-532-CV-EBD

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, a federally recognized Indian Tribe; BILLY CYPRESS

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

Before: ANDERSON, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by the Appellants, Miccosukee Tribe of Indians of Florida, et al. is **DENIED**.

Appendix C

ENTERED FOR THE COURT:

s/ Gail F. Dubina
UNITED STATES CIRCUIT JUDGE

APPENDIX D — PETITION FOR REHEARING DATED AND FILED DECEMBER 30, 1998

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-5488

D.C. Docket No. 95-532-CV-EBD

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, a federally-recognized Indian Tribe; BILLY CYPRESS

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, et al.

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida, Miami Division

Before ANDERSON, DUBINA and BLACK, Circuit Judges.

PETITION FOR REHEARING

The Miccosukee Tribe of Indians of Florida and Billy Cypress, ("Plaintiffs/Appellants") by and through undersigned counsel, respectfully submits this Petition for Rehearing and in support thereof states the following.

Appendix D

ARGUMENT

THE TRIBE REQUESTS THAT THE PANEL RECONSIDER ITS DECISION TO AFFIRM THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT PRIOR TO ANY DISCOVERY.

Plaintiffs-Appellants, the Miccosukee Tribe of Indians of Florida and Billy Cypress, respectfully requests that the panel reconsider its decision affirming the district court's grant of summary judgment in favor of defendants. The district court erred by refusing to allow Plaintiffs *any* discovery on their constitutional claims of violations of due process and equal protection. In its *per curiam* unpublished opinion, the panel stated that the Tribe did not set forth specific, non-conclusory facts that would enable it to prove its claims. *See* panel opinion at p. 3. In support of that proposition, the panel cited to the recent Supreme Court case of *Crawford-El v. Britton*, __ U.S. __, 118 S. Ct. 1584, 1596-97 (1998).[1]

In relying on the *Crawford-El* case, which involved a qualified immunity claim against a government official, the panel imposed a higher pre-discovery burden on the Tribe than has heretofore been exacted in cases not involving

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1. The *Crawford-El* case was served via Federal Express Priority Overnight mail by the United States as supplemental authority on October 30, 1988, and received by Plaintiffs' counsel us on November 2, 1998, only 2 days before the oral argument on this case. The case was discussed at oral argument but it was never briefed by either side.

individual suits against public officials. The Supreme Court framed the issues in the *Crawford-El* case as follows:

> Petitioner, a long-time prison inmate, seeks *damages from a corrections officer based on a constitutional claim that requires proof of improper motive*. The broad question is whether the courts of appeals may craft special procedural rules for such cases to protect public servants from the burdens of trial and discovery that may impair the performance of their official duties. *The more specific question is whether, at least in cases brought by prisoners, the plaintiff must adduce clear and convincing evidence of improper motive in order to defeat a motion for summary judgment.*

118 S.Ct. at 1587.

In *rejecting* the clear and convincing standard of proof imposed by the Court of Appeals, the Supreme Court in *Crawford-El* stated:

> The new rule established in this case is not limited to suits by prisoners against local officials, but applies to all classes of plaintiffs bringing damages against any government official, whether federal, state or local. See *Butz v. Economou*, 438 U.S. 478, 500-504, 98 S.Ct. 2894, 2907-2910, 57 L.Ed.2d 895 (1978). The heightened burden of proof applies, moreover, to the wide array of different federal law claims for which an official's motive is a necessary element, such as claims of race and

> gender discrimination in violation of the Equal Protection clause, cruel and unusual punishment in violation of the Eighth Amendment, and termination of employment based on political affiliation in violation of the First Amendment, as well as retaliation for the exercise of free speech or other constitutional rights. A bare majority of the Court of Appeals regarded this sweeping rule as a necessary corollary to our opinion in *Harlow*. [*Harlow v. Fitzgerald*, 457 U.S. 800 (1982)].

Crawford-El, 118 S.Ct. at 1590 (footnotes omitted). The Supreme Court in the above-quoted language was referring to the new standard imposed by the Court of Appeals and which the Supreme Court rejected. The Court stated that in fashioning a special rule for constitutional claims that require proof of improper intent, the judges of the Court of Appeals relied on *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), but that neither *Harlow* nor the concerns expressed by the Court of Appeals, "warrant the wholesale change in the law that they have espoused." The Court further stated that "[w]ithout such precedential grounding, for the Courts of Appeals or this Court to change the burden of proof for an entire category of claims would stray far from the traditional limits of judicial authority." *Id.* at 1595. The Supreme Court also confirmed that the Court of Appeals' "indirect effort to regulate discovery employs a blunt instrument that carries a high cost, for its rule also imposes a heightened standard of proof at trial upon plaintiff's with bona fide constitutional claims." *Id.*

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Given the language of the Supreme Court decision in *Crawford-El*, the panel's affirmance of the summary judgment grant by the district court, *without allowing any discovery* to the Tribe, is not consistent with the pre-existing law[2] or with the *Crawford-El* opinion. Moreover, any concerns with regard to protecting public officials from the costs associated with the defense of damage actions is not a concern in this case because the claims against the individuals were dismissed by the Tribe.

The panel opinion also relied on *Washington v. Davis*, 426 U.S. 229, 240 (1976), and *Parks v. City of Wasner Robins Co*, 43 F.3d 609, 616 (11th Cir. 1995), for the proposition that equal protection claims require proof of intent to discriminate, and on *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197-200 (1989), for the proposition that a due process claim requires the Tribe to prove either that there is a "special relationship" which arises only in limited circumstances: incarceration, institutionalization, or other similar restraints of personal liberty. However, in *Washington v. Davis*, the Court noted that "discovery and other proceedings followed [the Amended Complaint]." 426 U.S. at 233-34. Thus, *Washington v. Davis* did not involve a similar factual situation to the one here where no discovery was afforded to Plaintiffs. Moreover, the Supreme Court in *Shaney* did not limit due process violations to instances where there is some restraint on liberty, but rather

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2. Court decisions have consistently held that parties are entitled to adequate discovery before summary judgment. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Jones v. City of Columbus*, 120 F.3d 248 (11th Cir. 1997) and *WSB-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988).

stated that the restraint of liberty triggered the protections of the due process clause. In this case, the Tribe has a special trust relationship with the United States, which although not a restraint on liberty, does require that the United States be judged "by the most exacting fiduciary standard." *U.S. v. Mason*, 412 U.S. 391, 398 (1973). This special fiduciary relationship imposes a duty upon the United States. The Supreme Court has used such terms as "solemn," "special," to describe the federal government's relationship with Indian Tribes. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The clear duty imposed upon the United States by the trust doctrine, *see, e.g., U.S. v. Kagama*, 118 U.S. 375, 384 (1886), was violated here by flooding the Tribe's lands while protecting non-Indian lands. This intentional flooding, supported by the record even without discovery, violates the duty imposed under the trust doctrine as well as constitutional due process rights of Tribal members.

The panel additionally relied on *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-46 (1993), for the proposition that in order to sustain a due process claim, the governmental action that impinged on the Tribe's religious exercise was not neutral and generally applicable. Panel opinion at 3. However, *Church of the Lukumi* noted that facial neutrality is not determinative of whether law violates the free exercise clause, and that the free exercise clause forbids subtle departures from neutrality. 508 U.S. at 534. Without discovery, the Tribe should not have been forced into a summary judgment posture on the merits of its constitutional claims.

Appendix D

The district court rejected the Tribe's Motion under Fed. R. Civ. P. 56(f) and the panel affirmed the court below. However, the panel's language that the Tribe had not demonstrated how *further* discovery would enable it to rebut the Defendants' showing of the absence of genuine issue of fact, panel opinion at p. 5, apparently misunderstood the posture of the case because the Tribe was not asking for *further* discovery. Rather, the Tribe was simply asking to be allowed the discovery it never had. This Court's reliance on *Crawford-El* for the conclusion that summary judgment affidavits must set forth specific facts showing there is a genuine issue for trial did not appear to consider the issue of the district court's denial of any discovery, and relied on the standard language of Rule 56(f) relating to requests for further discovery.

Moreover, the Tribe submitted numerous affidavits which would satisfy any specific pleading requirements and may have even satisfied the clear and convincing standard which the Supreme Court in *Crawford-El* rejected as imposing too high a burden. Thus, while denied the right to discovery, the affidavits in support of the Tribe's opposition to summary judgment and in support of the Tribe's Rule 56(f) motion extensively detail the reasons which support the allegations of constitutional violations of due process and equal protection.

The Tribe alleged that Tribal lands were flooded to protect non-tribal lands and that the Tribal members were denied their right to practice their religion. In its Rule 56(f) motion to foreclose summary judgment prior to discovery, the Tribe attached an affidavit by Eugene Duncan, Director

of Water Resources at the Miccosukee Tribe, which alleged in pertinent part that Tribal lands were more adversely affected than Everglades National Park and that Tribal lands were more adversely affected than the lands of other landowners. (R3-65-Exh.C-1). This affidavit further asserted that without discovery on the alleged operation criteria and schedules for flood protection, the defendant's claims that they operated the structures which flooded the Tribe according to schedule could not be adequately rebutted, but nevertheless, based on Mr. Duncan's personal observations of the actions taken by the defendant, Mr. Duncan did not believe their actions were based on any such schedule. As an example, one of the gates, the S-333 was not opened until just a few days after their lawsuit was filed at a time when most of the area was dry but Tribal lands remained flooded. Moreover, the refusal to cut vegetation on the S-12 structures was not based on regulation schedule nor operation criteria. Moreover, Mr. Duncan's participation in meetings and discussions where defendants stated that flood protection for the Park was more important than flood protection for the Tribe was set forth in his affidavit. (R3-65-Exh.C-2-3). The affidavit of Mr. Duncan, attached as Exhibit C to the Tribe's Motion under Rule 56(f), extensively details supporting reasons supporting the Tribe's allegations (R3-65-Exh. C-1-3).

Mr. Duncan also filed several affidavits attached to the Tribe's Summary Judgment Response. In one, Mr. Duncan provides further support for the Tribe's claim that Tribal lands "were more adversely affected by flooding conditions than Everglades National Park and *other landowners* as a result of defendants' actions." (Emphasis supplied). (R3-67-Exh.

C-1). The greater adverse effects on the Tribe, discussed in Mr. Duncan's affidavit attached to the Tribe's Rule 56(f) Motion, were reiterated in this affidavit. In another affidavit of Mr. Duncan, attached to the Tribe's Response to the United States' Motion for Summary Judgment, he stated that Barbara West [Department of the Interior] had stated that the federal government's obligation was to the Park and not to the Tribe and that the Tribe had a "diminished status" and lesser flood protection rights because the land where tribal members lived is a Permit area.[3] (R3-67-Exh.D-3). In fact, Ms. West was incorrect because, nothing in the Permits drafted by the Park Service took away the Tribal members' constitutional rights to equal protection and due process. Nor could mere Permits issued by the Park Service deprive Tribal members of constitutional rights.[4] More importantly, the statements of federal officials cited above would have provided the specificity necessary for any suit, including an individual suit, against a government official. *See*, *Crawford-El* at 1592.

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3. Ms. West's comments were also heard by Steve Terry, who filed an affidavit (Exhibit J) and Angel Cortinas (Exhibit F). Mr. Cortinas' affidavit also stated that Federal Defendants' decision not to offer flooding assistance was "based on [the Tribe's] pending Everglades restoration lawsuits." (See, R3-67-Exh.F-2, Exhibit F at p. 2). *See e.g.*, *Pickering v. Board of Ed. Township High School Dist. 205, Will Cty.* 391 U.S. 563 (1968), cited in *Crawford-El*, at 1592, n. 10 (retaliation offends the Constitution because it threatens to inhibit exercise of the protected right).

4. Moreover, as Exhibit G [letter from then Tribal attorney Angel Cortinas to Assistant Secretary of Interior Bonnie Cohen] points out, the flooding crisis was not limited to the Permit Area but included the Tribe's reservation lands held in trust. *See also*, Mr. Cortinas' Affidavit, R3-67-Exh.F-1, Exhibit F at p.1).

Additionally, Assistant Secretary of Indian Affairs, Ada Deer, wrote a letter to Barbara West with regard to the flooding asking that the Department take certain action to relieve the flooding, stating that these actions would have no adverse impacts on the Park and that "[r]efusal by the Park to allow the COE to implement these actions to reduce flooding impacts on the Miccosukee Indian Tribe appears to be contrary to both Presidential and Departmental direction in fulfilling the federal government's trust responsibility to the Tribe." Composite Exhibit D to Tribe's Response to Summary Judgment. (R3-67-Exh.D-2).

Thus, given the ample evidence on this record to support Plaintiffs' claims of constitutional violations, at least, the Tribe set forth sufficient facts to entitle it to discovery. Plaintiff in this case was subjected to a higher standard than even the one rejected by the Supreme Court in *Crawford-El*. Although neither the district court nor the panel stated what standard was required of the Tribe herein, given the affidavits outlined above, and the allegations of the Complaint, the Plaintiffs set forth specific, non-conclusory factual allegations which satisfy even the stricter requirements sometimes imposed by courts in prisoner cases against individual defendants. *See, Crawford-El*, 118 S.Ct. at 1596-97.

Finally, even if *Crawford-El* broadly applies to all constitutional claims by clarifying the contours of the pleading standard requirements for those claims, and even if that case would stand for the proposition that the Tribe must plead more specifically than it did, and even if the Court rejects all the affidavits submitted by the Tribe as insufficient, at a minimum, the Tribe should be allowed to replead. In the

prior opinion of the appellate court in *Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991), the D.C. Circuit returned the case allowing Plaintiff to replead where a new case clarified the contours of the pleading standard requirements. At a minimum, this Court should do the same.

For the reasons discussed above, the decision that the Tribe did not raise a genuine issue of material fact against the SFWMD should be reconsidered. More importantly, the merits of the case against the SFWMD were not even an issue on appeal. The district court found that the SFWMD was immune under the Eleventh Amendment and did not reach the merits of the Tribe's case against the SFWMD. This court's decision, in effect gave the SFWMD a pass on the only issue before the panel — Eleventh Amendment immunity — an issue on which the SFWMD had the burden of proof and failed. Having failed to meet that burden, and having forced the Tribe to appeal the issue on an insufficient factual record, the SFWMD has waived the immunity issue and should not be permitted to develop a factual record now. *Cf. Christy v. Pennsylvania Turnpike Commission*, 54 F.3d 1146, 1144 (3rd Cir. 1995).

CONCLUSION

For the reasons stated above, the Miccosukee Tribe of Indians of Florida and Billy Cypress request that this Court reconsider its per curiam unpublished opinion and reverse the grant of summary judgment on both issues. In the alternative, the Tribe requests that the case be remanded with directions that the Tribe be permitted to amend its Complaint.

Respectfully submitted,

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By: s/ Sonia Escobio O'Donnell
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Sonia Escobio O'Donnell, Esq.
Florida Bar No. 250643

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Plaintiff's/Appellant's Petition for Rehearing was sent via pre-paid U.S. Mail on the *30th* day of December, 1998 to: Lisa E. Jones, Esq., Appellate Section, Environment and Natural Resources Division, United States Department of Justice, P.O. Box 23795, L'Enfant Plaza Station, Washington, D.C. 20026; Ruth Clements, Esq., South Florida Water Management District, P.O. Box 24680, 3301 Gun Club Road, West Palm Beach, FL 33406; and Peter B. Outerbridge, Esq., Assistant United States Attorney, 99 N.E. 4th Street, Miami Florida 33132-2111.

By: s/ Sonia Escobio O'Donnell
Sonia Escobio O'Donnell, Esq.
Florida Bar No. 250643

APPENDIX E — COMPLAINT OF THE MICCOSUKEE TRIBE OF INDIANS OF FLORIDA FILED IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED MARCH 16, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CV-95-0532

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, a federally-recognized Indian Tribe; and BILLY CYPRESS

Plaintiffs,

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF THE INTERIOR; BARBARA WEST, individually as well as in her official capacity as Special Assistant to the Assistant Secretary of the Interior for Fish, Wildlife and Parks; RICHARD G. RING, individually as well as in his official capacity as Superintendent of Everglades National Park; U.S. ARMY CORPS OF ENGINEERS; and SOUTH FLORIDA WATER MANAGEMENT DISTRICT.

Defendants.

COMPLAINT

Plaintiffs, Miccosukee Tribe of Indians of Florida ("the Tribe"/"Tribal government") and Billy Cypress file this suit

against defendants based on their violations of the Fifth and Fourteenth Amendments to the Constitution of the United States (Counts I-IV); violations of federal trust duties owed by the federal government defendants to Plaintiffs (Count V); action in the nature of a mandamus (Count VI); and Bivens claim against defendants Ring and West for their active involvement in the violations of Plaintiffs' constitutional rights (Count VII). Plaintiffs allege as follows:

PLAINTIFFS

1. The Miccosukee Tribe, which is a federally-recognized Indian Tribe, is composed of Native American Indians and, as such, form a discreet racial minority group based on their race and national origin.

2. Billy Cypress is the duly elected leader of the Tribal Government. Chairman Cypress is a Native American.

3. For centuries, the Tribe and its members have resided and worked within the Florida Everglades. The Tribe's land interests lie within the Florida Everglades and its entire way of life is dependent upon the natural Everglades. The term "Everglades" as used herein refers to the areas presently identified as the Florida Water Conservation Areas and Everglades National Park (located within the Southern District of Florida), although the Everglades ecosystem historically included a much larger area.

4. The entire way of life of the Tribe and its members, including their religious, cultural, economic, and historical identity, is based upon the Everglades ecosystem and upon

the preservation of the Everglades in its natural state, including but not limited to the quantity and quality of Everglades' waters.

5. The Tribe and its members rely upon the Everglades in its natural state to support their religious, subsistence and commercial activities. Plaintiffs' religious activities traditionally include the planting and harvesting of corn on tree islands in the Everglades. Subsistence activities include gathering of materials, hunting, and fishing within the Everglades. Plaintiffs' commercial activities include frogging, conducting airboat and other guided tours, and providing recreational and tourism facilities within the Everglades.

6. The Tribe's land interests and its natural resources (including its land, the flora and fauna living thereon, and the water flowing thereupon) lie within the Everglades. These interests include: (i) the Tribe's federal Indian Reservation; (ii) the Tribe's perpetual lease in Water Conservation Area 3-A (guaranteeing access, occupancy, and use in perpetuity under the terms of the Miccosukee Land Claims Settlement); and (iii) the Tribe's right to reside in Everglades National Park, recognized by Act of Congress and implemented by permit for use and occupancy of an area along the northern boundary of Everglades National Park. In their natural states and conditions, these areas sustain a unique balance of flora and fauna, dependent upon the natural flow of unpolluted water, which creates and supports the Miccosukee way of life.

7. The alteration of the natural state of the Everglades and its permanent destruction as a unique natural ecosystem, including unnaturally high water levels or imbalances in natural aquatic flora and fauna, seriously threatens the Tribe's entire way of life in the Everglades and infringes upon the Tribe's ability to practice its religious customs and maintain its traditional bases of subsistence, commercial activities, and natural resources (including its land, the flora and fauna living thereon, and the water flowing thereupon).

8. Any United States policy, agreement, practice, or action (whether explicit or tacit), including any decision by a federal official, which accepts, permits, overlooks, or encourages in any way, whether directly or indirectly, the unnatural flooding of tribal lands in the Everglades or otherwise upsets, alters or destroys the natural ecosystem of the Everglades, directly and substantially injures, harms, and damages each and every Miccosukee interest identified previously herein; to wit, the Tribe's entire way of life (and that of its members), the Tribe's religious, cultural, and historical identity (and that of its members), the Tribe's subsistence and commercial activities (and those of its members), and the Tribe's land and natural resource interests.

9. The equal protection guarantees of the Fifth and Fourteenth Amendments to the United States Constitution require that the federal and state governments treat similarly situated individuals in a similar manner. Plaintiffs have been denied their Constitutional equal protection rights as a result of defendants' disparate and discriminatory manipulation of water levels on tribal lands vis-a-vis water levels on other Everglades' lands, including those of Everglades National Park as alleged below.

10. The due process guarantees of the Fifth and Fourteenth Amendments to the United States Constitution require that the federal and state governments act in manner which does not deprive any person of life, liberty, or property without due process of law. Plaintiffs have been denied their Constitutional due process rights to practice their religious traditions and to the use and enjoyment of their tribal lands as a result of defendants' actions as alleged below.

DEFENDANTS

11. The United States of America ("the federal government") is the government of the United States, which may be named as a defendant under 28 U.S.C. § 1346(a)(2) and the Fifth Amendment to the Constitution of the United States.

12. The United States Department of the Interior ("Interior Department") is an agency of the federal government and may be named as a defendant under 28 U.S.C. § 1346(a)(2) and the Fifth Amendment to the Constitution of the United States.

13. Barbara West is a Special Assistant to the Assistant Secretary of the Interior for Fish, Wildlife, and Parks and may be named as a defendant under 28 U.S.C. § 1346(a)(2) and the Fifth Amendment to the Constitution of the United States. In that capacity and on behalf of the federal government and the Interior Department, defendant West has been actively and directly involved in violations of Plaintiffs' rights and protections under the Fifth Amendment alleged herein.

14. Richard G. Ring is the Superintendent of Everglades National Park and may be named as a defendant under 28 U.S.C. § 1346(a)(2) and the Fifth Amendment to the Constitution of the United States. In that capacity and on behalf of the federal government and the Interior Department, defendant Ring has been actively and directly involved in violations of Plaintiffs' rights and protections under the Fifth Amendment alleged herein.

15. The United States Army Corps of Engineers ("Corps") is an agency of the federal government and may be named as a defendant under 28 U.S.C. § 1346(a)(2) and the Fifth Amendment to the Constitution of the United States.

16. The South Florida Water Management District ("District") is an instrumentality and agency of the State of Florida and may be named as a defendant under the Fourteenth Amendment to the Constitution of the United States.

JURISDICTION AND VENUE

17. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1346, 1361, and 1362 and the Fifth and Fourteenth Amendments of the Constitution of the United States. The Court may issue declaratory judgments, mandamus, and injunctive relief pursuant to these jurisdictional statutes and 28 U.S.C. §§ 2201 and 2202 as well as *Fed.R.Civ.P.* 65(a).

18. Venue in this district is proper under 28 U.S.C. § 1391(b) as this claim arose in the Southern District of Florida and 28 U.S.C. § 1391(e) because this is a civil action against officers and employees of the United States acting in their official capacity.

Appendix E

COUNT I

(EQUAL PROTECTION CLAIM AGAINST FEDERAL DEFENDANTS)

19. Plaintiffs reallege and incorporate by reference paragraphs 1-9 and 11-18 of this Complaint.

20. From on or about September 1, 1994 to the present and on-going, defendants United States of America, U.S. Department of the Interior, Barbara West, Richard G. Ring, and U.S. Army Corps of Engineers violated Plaintiffs' rights and protections under the Fifth Amendment of the Constitution of the United States by acting and failing to act in a manner that deprived Plaintiffs of equal protection guarantees through their disparate, unequal and discriminatory water delivery to tribal lands in the Everglades vis-a-vis federal government lands in Everglades National Park.

21. Plaintiffs' claim under Count I does not exceed $10,000.

COUNT II

(EQUAL PROTECTION CLAIM AGAINST DISTRICT)

22. Plaintiffs reallege and incorporate by reference paragraphs 1-9 and 11-18 of this Complaint.

23. From on or about September 1, 1994 to the present and on-going, defendant South Florida Water Management

District ("District") violated Plaintiffs' rights and protections under the Fourteenth Amendment of the Constitution of the United States by acting and failing to act in a manner that deprived Plaintiffs of equal protection guarantees through its disparate, unequal and discriminatory water delivery to tribal lands in the Everglades vis-a-vis other lands in the Florida Everglades.

24. Plaintiffs are entitled to recover compensatory and punitive damages against the District under Count II.

COUNT III

(DUE PROCESS CLAIM AGAINST FEDERAL DEFENDANTS)

25. Plaintiffs reallege and incorporate by reference paragraphs 1-8 and 10-18 of this Complaint.

26. From on or about September 1, 1994 to the present and on-going, defendants United States of America, U.S. Department of the Interior, Barbara West, Richard G. Ring, and U.S. Army Corps of Engineers violated Plaintiffs' rights and protections under the Fifth Amendment of the Constitution of the United States by acting and failing to act in a manner that deprived Plaintiffs of life, liberty, and property without due process of law through defendants' excessive water delivery to and flooding of tribal lands in the Everglades.

27. Plaintiffs' claim under Count III does not exceed $10,000.

Appendix E

COUNT IV

(DUE PROCESS CLAIM AGAINST DISTRICT)

28. Plaintiffs reallege and incorporate by reference paragraphs 1-8 and 10-18 of this Complaint.

29. From on or about September 1, 1994 to the present and on-going, defendant South Florida Water Management District violated Plaintiffs' rights and protections under the Fourteenth Amendment of the Constitution of the United States by acting and failing to act in a manner that deprived Plaintiffs of life, liberty, and property without due process of law through defendants' excessive water delivery to and flooding of tribal lands in the Everglades.

30. Plaintiffs are entitled to recover compensatory and punitive damages against the District under Count IV.

COUNT V

(BREACH OF TRUST CLAIM AGAINST FEDERAL DEFENDANTS)

31. Plaintiffs reallege and incorporate by reference paragraphs 1-8 and 11-18 of this Complaint.

32. Defendants United States of America, U.S. Department of the Interior, Barbara West, Richard G. Ring, and U.S. Army Corps of Engineers, owe trust obligations to Plaintiffs based on their fiduciary relationship.

33. From September 1, 1994 up to and including the present and on-going, the federal government defendants have breached and continue to breach their trust obligations to Plaintiffs by refusing to remove exotic and unnatural vegetation along the S-12 A through D structures, which vegetation has reduced and continues to reduce the natural flow of water from tribal lands, thereby flooding Plaintiffs' lands, homes, and property and preventing the S-12 structures from operating as designed.

COUNT VI

(ACTION IN THE NATURE OF A MANDAMUS AGAINST ALL DEFENDANTS)

34. Plaintiffs reallege and incorporate by reference paragraphs 1-8 and 11-18 of this Complaint.

35. Plaintiffs have a clear right to be protected from flood waters that inundate tribal lands, homes, and property.

36. All of the above-named defendants have a clear duty to take any and all necessary action which will alleviate and reduce flooding of tribal lands, homes, and property.

37. From September 1, 1994 up to and including the present and on-going, defendants have refused to remove exotic and unnatural vegetation along the S-12 A through D structures, which vegetation has reduced and continues to reduce the natural flow of water from tribal lands, thereby flooding Plaintiffs' lands, homes, and property and preventing the S-12 structures from operating as designed.

Appendix E

38. To the extent that the Court cannot grant the relief requested under Counts I-V of the Complaint, there is no other adequate remedy at law.

39. Plaintiffs request that the Court issue an order, in the nature of a mandamus, directing all of the above-named defendants to act to relieve flooding of tribal lands, homes, and property, including but not limited to the removal of vegetation along the S-12 A through D structures.

COUNT VII

(BIVENS ACTION AGAINST DEFENDANTS RING AND WEST)

40. Plaintiffs reallege and incorporate by reference paragraphs 1-18 of this Complaint.

41. Plaintiffs have a clear constitutional right to equal protection guarantees under the Fifth Amendment of the United States Constitution, which rights were well known to defendants Ring and West.

42. Plaintiffs have a clear constitutional right to due process guarantees under the Fifth Amendment of the United States Constitution, including protections against infringements on fundamental rights, such as freedom of religion and protections against public use and takngs of private property, which rights were well known to defendants Ring and West.

43. Plaintiffs' due process guarantees include their rights to exercise traditional religious practices, which includes the planting of corn on tree islands located throughout tribal lands in the Everglades and later harvesting the corn. The direct actions of defendants Ring and West denied Plaintiffs their rights to exercise their religious freedoms.

44. Plaintiffs' due process guarantees also include their rights to the use and enjoyment of tribal lands in the Everglades, which rights have been infringed upon and denied as a result of the direct actions of defendants Ring and West.

45. Plaintiffs' equal protection rights include the Constitutional guarantee that federal government action will result in the treatment of similarly situated individuals in a similar manner. By forcing water levels on tribal lands to held at much higher levels than at Everglades National Park, defendants Ring and West actually and directly denied Plaintiffs' their equal protection rights.

46. From September 1, 1994 up to and including the present and on-going, defendants Ring and West have refused to allow the removal of exotic and unnatural vegetation along the S-12 A through D structures, which vegetation has reduced and continues to reduce the natural flow of water from tribal lands, thereby flooding Plaintiffs' lands, homes, and property and preventing the S-12 structures from operating as designed.

47. In so doing, defendants Ring and West were actively and directly involved in violations of Plaintiffs' Constitutional guarantees of equal protection and due process as alleged above.

48. During all times material to this Complaint, defendants Ring and West acted outside the scope of their employment and authority.

49. Plaintiffs are entitled to recover compensatory and punitive damages against defendants Ring and West, in their individual capacities, under Count VII.

DEMAND FOR JURY TRIAL

50. Plaintiffs demand a jury trial on all counts and issues so triable.

RELIEF REQUESTED

WHEREFORE, Plaintiffs pray that this Court:

A. Declare that defendants committed the violations alleged in Counts I-VII of the Complaint as alleged above;

B. Require defendants to relieve flooding conditions on Plaintiffs' lands, which includes but not is not limited to their removing the exotic and unnatural vegetation along the S-12 A through D structures;

C. Award Plaintiffs compensatory and punitive damages based on defendants' actions as alleged above;

D. Grant Plaintiffs' attorneys fees and costs; and such other relief as may be appropriate and just.

March 16, 1995

Appendix E

Respectfully submitted,
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Supreme Court, U.S.
FILED
JUN 21 1999
CLERK

No. 98-1692

IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
a federally-recognized Indian Tribe
and BILLY CYPRESS,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT SOUTH FLORIDA WATER MANAGEMENT DISTRICT

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QUESTION PRESENTED

Respondent, South Florida Water Management District, restates the Questions Presented as follows:

Does the decision of the United States Court of Appeals for the Eleventh Circuit, that the district court did not abuse its discretion by granting summary judgment on the extensive record before it and denying Petitioners' request to foreclose entry of summary judgment in order to conduct discovery, create a conflict with decisions of other federal circuit courts sufficient to call for an exercise of this Court's supervisory power?

STATEMENT PURSUANT TO RULE 29.6

The South Florida Water Management District is a political subdivision of the State of Florida existing by virtue of Chapter 25270, Laws of Florida, 1949, and operating pursuant to Chapter 373, Florida Statutes and Title 40E, Florida Administrative Code, as a multipurpose water management district.

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Respondent South Florida Water Management District ("SFWMD") believes that the Court has already addressed and decided the question presented in the Petition and that there is neither non-compliance with settled Supreme Court law nor conflict among the federal circuit courts. Therefore, SFWMD respectfully requests denial of the Petition.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below:

On March 16, 1995, the Miccosukee Tribe and Tribal Chairman Billy Cypress (collectively the "Tribe"), filed suit in the district court against the United States, the United States Corps of Engineers ("Corps"), the Department of Interior and SFWMD, alleging violations of their Fifth and Fourteenth Amendment rights to Due Process and Equal Protection.[1] R1-1.[2] The Tribe sought declaratory and injunctive relief and to compel the defendants to relieve the flooding on the Tribal lands and remove the vegetation along the S-12-A-D structures. R1-1.

With its complaint, the Tribe simultaneously filed an Emergency Motion for Preliminary Injunction (R1-4), with exhibits, seeking removal of the vegetation behind the S-12

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1. The Tribe also asserted a violation of trust duties owed by federal defendants and a *Bivens* claim against two federal defendants in their individual capacities. Neither of these counts were against SFWMD.

2. Citations are to the record below, the Petition or the appendix filed with the Petition. References to the district court's docket sheet will be to volume number and docket entry by "R(volume no.) - (entry no.)" Citations to the Petition are indicated by "Pet." while the appendix is indicated by "App." followed by the appropriate letter and page number.

structures. All defendants opposed this motion (R1-11 to 29 (motions and affidavits)). Arguments on the motion were heard on March 27, 1995, and on March 31, 1995, the district court entered its Order denying the motion. R1-40. Thereafter, in May, 1995, the SFWMD and the federal defendants moved for summary judgment.[3]

On June 16, 1995, three months after filing suit, the Tribe filed a motion pursuant to Fed. R. Civ. P. 56(f) to foreclose entry of summary judgment based on what it perceived as an inadequate opportunity to conduct discovery. R3-65. The Tribe also filed a response in opposition to the summary judgment motions. R3-67. With its Rule 56(f) motion, the Tribe included one affidavit, document production requests and interrogatories. R3-65. The Tribe filed six additional affidavits and document production requests with its summary judgment response. R3-67.

In response, defendants opposed the Tribe's Rule 56(f) motion and also moved for protective orders staying discovery. R3-88 (SFWMD); R3-81, 85 (federal defendants). On August 16, 1995, the district court denied the Tribe's Rule 56(f) motion to foreclose entry of summary judgment. R3-97.

The district court recognized that Rule 56(f) allows a party to survive summary judgment if the party " 'presents valid reasons justifying his failure of proof.' " R3-97 at 3 (citing *Barfield v. Brierton*, 883 F.2d 923, 931 (11th Cir. 1989) (quotations omitted)). The court concluded, however, that

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3. In addition to the motions for summary judgment filed separately by the SFWMD and the federal government, individual Defendants Richard Ring and Barbara West filed a motion for summary judgment and a motion for dismissal for lack of personal jurisdiction. R2-47. Subsequently, the Tribe voluntarily dismissed the individual capacity claims against West and Ring. R4-107.

the Tribe's motion failed to carry its burden to present an affidavit which contains specific facts explaining how deferring disposition by summary judgment would allow the Tribe, through discovery or other means, to rebut the movant's showing that no disputed material facts exist. *Id.* The court concluded that the extensive record that had been generated in the case during the preliminary injunction stage was "more than sufficient" to resolve the issues raised on summary judgment, denied the Tribe's motion under Rule 56(f), and stayed discovery until the court ruled on the motions to dismiss and for summary judgment. *Id.* at 6. Thereafter, the Tribe moved to lift the stay (R4-115) and filed one supplemental affidavit. R4-116.

After the Tribe filed affidavits, exhibits and responses in oppositions to all motions for summary judgment and after the district court held a hearing on the motions, the court, on August 1, 1997, granted the defendants' motions for summary judgment, denied all other motions as moot, and entered judgment for the defendants. R4-122, 123. Initially, at the August 1, 1997 hearing, the court addressed the Tribe's renewal of its Rule 56(f) motion. R4-122 at 2, n.1. The court held that "[Petitioners'] counsel did not state what specific facts he expected further discovery to produce" and, once again, held that the Tribe failed to meet its burden to show any genuine issues of material fact remaining. *Id.*

Turning to the merits, the court first held that SFWMD is entitled to Eleventh Amendment immunity. R4-122 at 13-15. Next, the court held that the federal defendants did not breach their duty of trust to the Tribe. R4-122 at 16-19. Addressing the Tribe's Due Process challenges (R4-122 at 19-23), the court found no merit in the alleged violations of its rights: (1) to enjoy Tribal lands; and (2) to practice religion under the First Amendment. The court rejected the Tribe's argument that the federal defendants' failure to provide

certain requested flood relief violated a property interest of the Tribe and similarly rejected the assertion that the trust relationship between the United States and the Tribe gives rise to a "special relationship" under which the government has affirmative duties. Following this Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 448-50 (1988), the court next rejected the Tribe's Free Exercise claim. *Id.* at 21-23.

Finally, the court rejected the Tribe's Equal Protection claim. Finding the statutes and operating criteria, under which the decisions were made not to grant the two flood relief requests, to be racially and ethnically neutral, the court looked to whether the decisions showed discriminatory purposes. *Id.* at 24. Noting that the Tribe presented evidence showing the defendants' actions adversely impacted them by prolonging the impacts on Tribal land, the court found no evidence that the defendants made their decisions because they would prolong the flooding. *Id.* The court specifically noted that the Tribe's "alleged proof of discriminatory purpose" merely recited the Corps' and National Park Service's decisions to deny the Tribe's requests where other agencies favored them. *Id.* at 24. Noting that "this evidence does not raise a genuine factual issue on the subject of discriminatory purpose," the court held that the Tribe's failure to show such discriminatory purpose was fatal to their claim. *Id.* at 24-25.

The Tribe filed a motion for reconsideration (R4-124) which the court denied on August 28, 1997. R4-129. On September 2, 1997, the Tribe filed its appeal with the Eleventh Circuit Court of Appeals. R4-130. The Eleventh Circuit Court of Appeals issued an opinion on November 19, 1998 affirming the district court on the claims of equal protection, due process and the trust doctrine, but not deciding the issue of whether the SFWMD was immune

under the Eleventh Amendment.[4] In its per curiam opinion, the court stated that the Tribe's due process and equal protection claims against the federal defendants and the SFWMD were identical. App. A at 5a. In addressing the claims against the federal defendants, the court relied on this Court's decisions in holding that the equal protection claim requires proof of discriminatory intent and the due process claim requires the Tribe demonstrate a "special relationship" between the Tribe and the governmental entity that gives rise to a governmental duty of care. App. A at 3a (citations omitted). The court found that "[t]he Tribe has not alleged any specific, nonconclusory facts that would enable it to prove these claims." App. A at 4a (citing *Crawford-El v. Britton*, 118 S. Ct. 1584, 1596-97(1998) (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)) ("[T]he court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.")

A subsequent Petition for Rehearing, stating the same arguments as presented in the Petition before this court, was denied. App. C at 47-48a. This Petition for Writ of Certiorari followed.

B. Statement of Facts

As described in the Tribe's Petition, in late August to October, 1994, central and south Florida received record

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4. The court recognized that the Eleventh Amendment immunity defense is a matter jurisdiction, but said it would address the merits of the case first since "it would benefit neither this court nor the parties to engage the immunity issue where doing so would only prolong this litigation without changing its inevitable outcome." App. A at 5a, n.1 (citations omitted).

rainfall.[5] R1-14. The Everglades in general, and more specifically, Water Conservation Area 3A ("WCA-3A") began experiencing high water conditions in August, 1994. R1-14. The already saturated ground condition was exacerbated on November 15, 1994 when Tropical Storm Gordon, a once in 50 year storm, drenched south Florida producing widespread rainfall and record high water levels. R1-14; R1-15. Due to the high water, the Tribe closed its federal Reservation[6] to the public (R4-122 at 7) and WCA-3A was closed to public access on September 29, 1994. *Id.* The heavy rains and Tropical Storm Gordon affected the Tribe, its lands, and its ability to plant crops and engage in traditional religious ceremonies. R4-122 at 9-10.

The Tribe claimed that flooding of the hammocks and tree islands in WCA 3A did not allow the Tribal members to

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5. The abnormally heavy rainfall began in May 1994. R1-15.

6. The Tribe has various south Florida land interests. R4-122 at 3-4. First, the United States holds in trust, reservation lands for the Tribe in the Everglades area outside the Everglades National Park. *Id.* No members of the Miccosukee Tribe live on the Reservation lands. Second, the Miccosukee Tribe, pursuant to a special use permit issued by the National Park Service, has the use and occupancy of a 333.1-acre tract of land located within the Everglades National Park (the "Permit Area"). *Id.* The Permit Area is where the Tribe's offices and most of the members' residences are located. R1-19. Third, east of and adjacent to the main reservation lies a 189,000-acre tract of land the Tribe has leased from the State of Florida (the "Leased Area") which is also located in the Everglades region but not within the Everglades National Park. *Id.* Both the Leased Area and much of the Miccosukee Reservation (50,000 acres) are located within "Water Conservation Area 3A" — a flood control area within the central and southern Florida project ("C&SF project") under the jurisdiction of SFWMD and the Corps. R1-14. Water Conservation Area 3A ("WCA-3A") lies to the north of Everglades National Park. The Tribe's flooding complaints are directed toward WCA 3A. R1-1.

practice their religion (an integral part of which is planting and harvesting of corn) and had adversely affected wildlife. R1-1. The Tribe claimed that the SFWMD's water control practices placed an unequal flooding burden on the Tribe. *Id.* First, the Tribe stated that the S-12A through D gate structures were not discharging to capacity since a vegetation barrier directly behind the structures allegedly impeded water flowing through the S-12 structures. *Id.* Second, the Tribe stated that throughout the Tribe's flooding crisis, the SFWMD maintained the S-333 gate structure at the southeast corner of WCA 3A closed and continued to keep it closed. *Id.*

The Tribe alleged that rather than allow water to flow naturally south into the Everglades National Park ("ENP"), the SFWMD chose to place the burdens of elevated water levels and persistent flooding on the Tribe. *Id.* The Tribe asserted that with the advent of South Florida's rainy season, flood levels on tribal lands had to be reduced substantially to make room for the expected increases in water levels throughout the Everglades. *Id.*

The Tribe first approached SFWMD about their concerns on October 17, 1994, well after flooding conditions in the WCA-3A had resulted in closing of the area to public access. R1-9 at ¶¶ 2-3; R1-12 (Terry) at ¶ 7; R3-67 at 8-9. Even though the SFWMD has at least a flowage easement over the entire Miccosukee Federal Indian Reservation and Tribal leased lands contained within WCA 3A, the SFWMD took all possible steps to alleviate flooding within WCA 3A. R1-13; R1-14; R1-16; R1-17.

At that initial meeting, SFWMD suggested a possible remedy would be to increase flows from WCA-3A through the S-12 and S-333 structures. R1-9 at ¶ 3; R3-67 at 9. Unknown at that time to the SFWMD representative who

made the suggestion, the S-12 structures were already fully open and the S-333 structure was required to be closed pursuant to the operating criteria.[7] R2-33 at 14, 18; R1-14 at 9-11; R2-54 at 3-4. In any event, notwithstanding SFWMD's genuine interest in addressing the Tribal concerns about the flooding, the Tribe was aware at all times that SFWMD had no authority to increase flows through the S-12 or S-333 structures and that such authority was vested in the Corps and ENP. R1-9 at ¶ 3.

Regarding the gates on the S-12 structures, primary outflow for WCA 3A, the gates were fully open and completely out of the water from September 18, 1994 until May 3, 1995. R-14; R2-54. On May 3, 1995, in accordance with the Corps' operating criteria, the S-12 gates were lowered from an approximate 12 foot opening to an approximate 1/2 to 1 foot opening. R2-54. The Tribe was notified of this action and agreed that it was appropriate since WCA 3A was drying out. *Id.*

Although the SFWMD did not open S-333 until March 21, 1995 (R1-14; R2-33), this was not a discretionary act. The operation of S-333 is regulated by strict operating criteria to protect the public interests by avoiding flooding of the Miccosukee native homes and the 8 1/2 square mile residential area.[8] R2-33. During November 1994, surveys

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7. The operating criteria are set out in the June 1993 Final Environmental Assessment for the Experimental Program of Water Deliveries to Everglades National Park ("EA"). The District Court had previously approved the EA in *South Dade Land Corp. v. Sullivan*, 853 F. Supp. 404, 409-10, 412 (1993). R2-40 at 6, n.4. R2-33 at 14, 18; R1-14 at 9-11; R2-54 at 3-4.

8. In their response, the Tribe asserted that ENP advocated opening the S-333 structure but that the Corps refused. R3-67 at 13; *see also id.* at 9. SFWMD notes that the affidavits cited do not support

(Cont'd)

performed by the Dade County Office of Emergency Management found that the 8 1/2 square mile area had 12 to 18 inches of standing water with pockets up to five feet deep. R2-35. By March 21, 1995, water levels receded sufficiently to allow the opening of S-333 in accordance with the EA operating criteria. R1-14; R2-33.

During November 1994, in response to high water levels in WCA 3A, the South Atlantic Division of the Corps gave approval to the Jacksonville District, U.S. Army Corps of Engineers, for a temporary deviation from the approved regulation schedule of WCA 1 and 2A. R2-33. This allowed the Corps and the SFWMD to hold water levels one and a half feet higher in WCA 1 and one to three and a half feet higher in WCA 2A to avoid discharges into WCA 3A. R2-33; R1-14. These steps resulted in less water reaching WCA 3A. Additionally, since the end of July, 1994, Lake Okeechobee regulatory discharges had been made only through WCAs 1 and 2 without going into WCA 3A. R1-14.

Along with operational efforts, during Tropical Storm Gordon (November 15-17, 1994), the SFWMD worked cooperatively with the Corps to immediately alleviate localized flooding in the Tribe's village south of Tamiami Trail. R1-13; R1-16; R2-33. During the height of the storm, the SFWMD removed culverts and a section of the old U.S. 41 roadway in Dade County which was restricting flows to the south out of WCA 3A. *Id.* Also to alleviate high water levels in the Tribal village, the SFWMD added boards to the culverts at the S-12F structure to block westerly flow towards the Miccosukee village. *Id.* The SFWMD also removed flashboards at S-346, S-347 and G-71 to maximize discharge

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(Cont'd)

the factual assertion. Nevertheless, even accepting the assertion as true, it further demonstrates SFWMD's lack of involvement in the decisions about which the Tribe complained.

through the L-67 Extension located east of the village. R1-16. All of this was done in response to the Tribe's request to look at actions which could be implemented immediately to alleviate the high water conditions. R2-33.

In addition to the SFWMD's actions, the Corps placed earthen plugs between S-12A and S-12B to cut off the flow of water entering the Tribal village through the east-west borrow canal parallel to old U.S. 41. R1-26; R1-24 at ¶8. Subsequent observations revealed that the remedial efforts were successful since water levels had receded and the homes in the area appeared dry. R1-24 at ¶6.

Throughout their affidavits and papers, the Tribe averred and stated that SFWMD, at all material times, supported the removal of the vegetation below the S-12 structures. The Tribe also averred and stated that the decision not to remove the vegetation was made solely by federal actors, specifically ENP (or Richard G. Ring, Superintendent of ENP) and the United States Department of Interior (or Barbara West, Special Assistant to the Assistant Secretary of the Interior for Fish, Wildlife and Parks):

> [SFWMD] . . . favored removal of vegetation along the S-12 structures. The Superintendent of Everglades National Park, Richard Ring, rejected this proposal. Barbara West supported Ring's refusal. . . .
>
> * * * *
>
> [SFWMD] . . . agreed that vegetation removal along the S-12 structures would assist in relieving the flooding of tribal lands. . . . Despite agreement by the . . . [SFWMD] on the need for vegetation removal behind the S-12 structures in order to reduce tribal flooding conditions, the officials

> from [ENP] and the Department of Interior refused permission to allow the vegetation removal and, to date, have prevented the Corps and [SFWMD] from taking steps to alleviate the flooding on tribal lands throughout the Everglades.

R1-9 at ¶¶8, 11; R1-12 (Terry) at ¶4; R1-12 (Jones) at ¶4.

> I personally know that [SFWMD] . . . advocated and strongly favored the vegetation removal behind the S-12 structures.
>
> The only parties who opposed and prevented the vegetation removal were ENP Superintendent Richard Ring and Barbara West of Department of Interior.

R4-116 at ¶¶5-6.

> The Army Corps and [SFWMD] have been ready to implement the solutions but have been prevented from doing so by [ENP] Superintendent Dick Ring and Interior's Office of Parks, Fish and Wildlife.

R3-67, Ex. G at 2. In addition to these sworn and evidentiary factual statements, similar statements are contained throughout the Tribe's papers filed in response to the various summary judgment motions. R3-67 at 11-13, 18, 27, 35-36 and n.16, 43; R2-64, ¶¶11,13,16; R2-62 ¶¶5,8).[9]

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9. The affidavits and arguments presented, as well as the evidence relied upon, by the Tribe clearly demonstrate that their claim was against the federal Defendants and that Petitioners had absolutely no good faith basis for bringing the action against

(Cont'd)

REASONS FOR DENYING THE WRIT

The Petition does not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. The South Florida Water Management District respectfully submits that this Petition should be denied.[10]

The Tribe alleges that the district court, after erroneously denying its Rule 56(f) motion to foreclose entry of summary judgment, prematurely granted summary judgment before "adequate" discovery. Pet. at 11. Contrary to the Tribe's allegations, since the Tribe failed to make a specific showing of the need for discovery under Rule 56(f), the district court did not abuse its discretion in granting summary judgment without discovery. *See United States v. Light*, 766 F.2d 394, 397 (8th Cir. 1985).

(Cont'd)
SFWMD. *See Swint v. City of Wadley*, 5 F.3d 1435 (11th Cir. 1993), *as amended*, 11 F.3d 1030 (11th Cir. 1994), *vacated in part on other grounds*, 115 S. Ct. 1203 (1995). Indeed, the relief which the Tribe sought clearly cannot be compelled from SFWMD, which admittedly lacks the authority to provide said relief. *See All Care Nursing Service, Inc. v. Bethesda Memorial Hospital, Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989).

10. The Tribe also argues that the Writ of Certiorari should be granted and this case remanded since the Eleventh Circuit "relied" on the intervening U.S. Supreme Court decision of *Crawford-El v. Britton*, 523 U.S. 574 (1998) in affirming the district court. However, contrary to the Tribe's argument, the Eleventh Circuit did not "rely" on *Crawford-El*, but in fact, cited to Rule 56(e) in finding that the Tribe had not alleged any specific, non-conclusory facts that would enable it to prove its claims. App. A at 4a. The cite to *Crawford-El* in the Eleventh Circuit opinion is dicta as the Eleventh Circuit relied on the explicit requirement of Rule 56(e) that summary judgment affidavits must set forth specific facts. *Id.* The Eleventh Circuit did not apply anything new that requires yet another bite at the apple.

There is no general right to discovery and Rule 56 of the Federal Rules of Procedure, which governs summary judgment, does not require trial courts to allow parties to conduct discovery before entering summary judgment. *Brown v. Chaffee*, 612 F.2d 497, 504 (10th Cir. 1979); *United States v. Bloom*, 112 F.3d 200, 205 n.17 (5th Cir. 1997); *Public Ser. Co. v. Continental Cas. Co.*, 26 F.3d 1508, 1518 (10th Cir. 1994); *Light*, 766 F.2d at 397. Abuse of discretion is only found where "the movant diligently pursued other discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment." *Qualls v. Blue Cross of California*, 22 F.3d 839, 844 (9th Cir. 1994). Moreover, the existence of Rule 56(f) shows that the Tribe's argument that it is per se improper to grant summary judgment without providing the opponent an opportunity to conduct discovery is without merit.

Rule 56(f) specifically addresses the question of summary judgment prior to discovery.[11] However, Rule 56(f) is not to be construed as a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. To survive a motion for summary judgment under Rule 56(f), a party must present " 'valid reasons justifying his failure of proof.' " *Barfield v. Brierton*, 883 F.2d 923, 931 (11th Cir. 1989) (quoting *Wallace v. Brownell Pontiac-GMC Co.*, 703 F.2d 525, 527 (11th Cir. 1983)). The party seeking to use Rule 56(f) " 'may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts,' but rather he must specifically

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11. Rule 56(f) provides: Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

demonstrate 'how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.' " *Wallace v. Brownell Pontiac-GMC Co.*, 703 F.2d 525, 527 (11th Cir. 1983) (quoting *Security & Exchange Comm'n. v. Spence & Green Chem. Co.*, 612 F.2d 896 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082 (1981)).

In its Rule 56(f) motion, the Tribe claimed that through discovery it would "become aware of numerous documents as well as meetings and conversations of the various defendants during the many months of the Tribe's flooding crisis." R3-65 at 3. The Tribe then claimed that this discovery would enable it to show a list of facts that would create a genuine issue of material fact. R3-97 at 4. As stated in the district court's Order on the Rule 56(f) motion, "a careful review of the list reveals that many of the entries relate to legal issues or factual matters that are not in dispute." R3-97 at 4. The district court found:

> For example, the entries regarding the water quality, the nature of the vegetation, and the benefits and consequences of removing the vegetation are either accepted as true by the defendants for purposes of the summary judgment motions or are immaterial to the issues raised. . . . Also, the matters concerning the Tribe's legal rights to exercise their religion and use of tribal lands are questions of law based upon documentation that is admitted [in volumes of evidence filed in connection with preliminary injunction] and controlling and is included as part of the record.

R3-97 at 4.

In reviewing the remaining entries on the Tribe's list, which allegedly would show a genuine issue of material fact as to the discrimination claim, the district court stated "it is far from clear how that information will enable the Tribe to show discrimination." R3-97 at 5. As to the Tribe's claim that discovery could show purposeful discrimination, the district court found that the requested discovery might "make the Tribe aware of more meetings and documents" but that the Tribe had not shown how that information would enable it to show discrimination. *Id.* at 5.

The Duncan affidavit, submitted by the Tribe in conjunction with the Rule 56(f) motion, merely alleged that the defendants had meetings that the Tribe was not invited to, and that documents related to these meetings would show purposeful discrimination. *Id.* The district court found this affidavit amounted to nothing more than a "vague assertion of unspecified information" which was "insufficient as it amounts to no more than speculation regarding the existence of probative evidence of the defendants' motivation for their actions." R3-97 at 5. Therefore, the district court denied the Tribe's motion finding that the volumes of evidence already in the record were "more than sufficient to determine the issues involved in the pending summary judgment motions." R3-97 at 4, 6.

On appeal to the Eleventh Circuit, the Tribe asserted that the district court made findings of fact without allowing the Tribe the opportunity to conduct discovery, but failed to show that the district court abused its discretion. As to discriminatory purpose, the Tribe asserted that discovery would show "defendants' purposeful discrimination against Plaintiffs based on their race and Indian heritage" and "defendants' purposeful disregard for Plaintiffs' religious freedoms and rights to use and occupy tribal lands." R3-65 at 3. These vague assertions do not specify any facts, they

merely draw legal conclusions much like alleging a need for discovery to prove "negligence." In both instances the Tribe has identified a general allegation it hopes to prove, but no specific facts it believes it will be able to discover. "Neither 'conclusory allegations' . . . nor brash conjecture coupled with earnest hope that something concrete will materialize is sufficient to block summary judgment." *J Geils Band Employee Benefits Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1251 (1st Cir. 1996), *cert. denied*, 117 S. Ct. 81 (1996).

The Tribe's mere speculation and hope about what discovery might produce does not satisfy Rule 56(f); the Tribe is not entitled to conduct what is, at its core, a "fishing expedition." *Jarvis v. Nobel/Sysco Food Services Co.*, 985 F.2d 1419, 1422-23 (10th Cir. 1993). Rather, if the Tribe alleges that the SFWMD was improperly motivated, the Tribe must indicate specific facts constituting sufficient probative evidence from which a trier of fact could find such improper motive. *Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 472-73 (9th Cir. 1991) (summary judgment proper in absence of sufficient evidence of racial animus).

The Tribe ignored the requirements of Rule 56 and its submission to the district court amounted to nothing more than vague assertions that the SFWMD had violated its rights and hopes that discovery would unearth concrete facts showing such violation. As the Eighth Circuit explained, "Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. . . . Where . . . a party fails to carry his burden, postponement of a ruling on summary judgment is unjustified." *Light*, 766 F.2d at 397.[12]

12. This Court's decision in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and the Eleventh Circuit's decisions in *Jones v. City of*

(Cont'd)

CONCLUSION

For the reasons given above, and for those given in respondents', United States of America, United States Department of the Interior, and the United States Army Corps of Engineers, brief in opposition in this same case, the petition should be denied.

Respectfully submitted,

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(Cont'd)
Columbus, 120 F.3d 248 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1797 (1998), and *WSB-TV v. Lee*, 842 F.2d 1266 (11th Cir. 1988) which stand for the proposition that the summary judgment must be decided upon an adequate record, do not show the district court abused its discretion in this case. The district court expressly found that the record in this case contained extensive affidavit testimony and documentary evidence from the preliminary injunction, motions and hearing. The district court found that this evidence was "more than sufficient to determine the issues involved in the pending summary judgment motions." R3-97 at 6.

Supreme Court, U.S.
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(3)

No. 98-1692

In the Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA AND BILLY CYPRESS, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by disposing of petitioners' claims against the federal respondents without permitting discovery.

2. Whether the court of appeals' citation to an intervening decision of this Court required remand of the case to the district court to permit petitioners to amend their complaint.

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BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished, but the decision is noted at 163 F.3d 1359 (Table). The opinion of the district court (Pet. App. 7a-46a) is reported at 980 F. Supp. 448.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1998. A petition for rehearing was denied on January 27, 1999 (Pet. App. 47a-48a). The petition for a writ of certiorari was filed on April 21, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arises from flooding caused by unusually heavy rains throughout central and south Florida during August, September, and October of 1994, followed almost immediately by Tropical Storm Gordon. The heavy rainfall subjected much of central and south Florida, and particularly the Everglades region, to flooding at a magnitude seen only once in every 50 years. Petitioners, the Miccosukee Tribe of Indians and Billy Cypress, reside within the Everglades region, within or near the northern boundaries of Everglades National Park. Petitioners filed this action against the South Florida Water Management District (SFWMD), the United States, the National Park Service, and the United States Army Corps of Engineers (Corps), asserting that the denial of two of their requested flood relief measures violated the Due Process Clause and the Equal Protection Clause. The district court granted summary judgment to respondents, and the Eleventh Circuit affirmed in an unpublished opinion.

1. Various statutes govern flood control, water supply, and environmental preservation in south Florida's regional hydrologic system and Everglades National Park. Since the 1940s Congress has enacted various flood-control legislation based on its recognition that "the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes." 33 U.S.C. 701a. Responsibility for implementing flood control projects is assigned to the United States Army Corps of Engineers. 33 U.S.C. 701b.

In 1948, Congress authorized the Central and Southern Florida Project (C&SF Project) as a comprehensive

flood control plan for the region. See Act of June 30, 1948, ch. 771, 62 Stat. 1171, 1175-1176 (codified at 33 U.S.C. 701-709b (1994 & Supp. III 1997)). The C&SF Project was intended to "control high water conditions * * * during the rainy season, and to impound additional water in Lake Okeechobee for use during the dry season." *Florida E. Coast Ry.* v. *United States*, 519 F.2d 1184, 1187 (5th Cir. 1975). See H.R. Doc. No. 643, 80th Cong., 2d Sess. (1948). The project furthers restoration and preservation goals in the unique Everglades Region and was developed "in full recognition of the importance of the Everglades National Park * * * at the southwestern tip of the Florida peninsula." H.R. Doc. No. 643, *supra*, at 4.[1]

The C&SF Project spans the area of south Florida from Lake Okeechobee to Florida's southernmost tip. That area contains three interconnected reservoirs—termed water conservation areas, or WCAs—of approximately 1350 square miles. The reservoirs impound water, while certain water control structures

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[1] The 1948 authorization governed the first phase of the Project, and the Project has been modified in a number of subsequent Acts of Congress. The Flood Control Act of 1954, ch. 1264, 68 Stat. 1248, adopted the entire plan. The Flood Control Act of 1968, Pub. L. No. 90-483, Tit. II, § 203, 82 Stat. 740-741, authorized the Everglades National Park-South Dade Conveyance System in accordance with H.R. Doc. No. 369, 90th Cong., 2d Sess. (1968). That document provided that "preservation of Everglades National Park is a project purpose and that available water should be provided on an equitable basis with other users." *Id.* at 1. In 1970, Congress approved a minimum delivery schedule of waters to Everglades National Park. River Basin Monetary Authorization and Miscellaneous Civil Works Amendments Act of 1970, Pub. L. No. 91-282, § 2, 84 Stat. 310. That schedule was later modified by the Supplemental Appropriations Act, 1984, Pub. L. No. 98-181, 97 Stat. 1153.

such as levees and gates regulate the inflow and outflow of water in WCAs. The impounding of waters in and outflow of waters from WCAs serve to store rainfall and run-off to prevent flooding, provide water for agricultural lands, preserve fish and wildlife, promote recreation and navigation, and preserve an adequate supply of fresh water to the Everglades. Pet. App. 14a-15a.

The 1948 Act grants the Corps of Engineers broad discretion in developing water-control plans and managing the operations and water levels of Water Conservation Areas. Recognizing that management of flood control projects requires the balancing of competing interests, Congress declined to waive the government's sovereign immunity from suits to recover damages for injury caused by flood or flood waters. See 33 U.S.C. 702c ("No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place."). Thus, Congress barred all suits, whether for damages or equitable relief, except those seeking limited review under the Administrative Procedure Act. See *United States* v. *James*, 478 U.S. 597, 604-605 (1986); *Reese* v. *South Fla. Water Management Dist.*, 59 F.3d 1128, 1130 (11th Cir. 1995). In the exercise of its discretion, the Corps has generated water control plans and manuals establishing operating instructions to permit the proper balance of storage water to accumulate during the wet season for use in the dry season.[2] See Pet. App. 15a-16a.

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[2] In developing water control plans, the Corps is subject to the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Pursuant to NEPA, the Corps prepared the June 1993 Final Environmental Assessment (EA) for the

2. In 1916, Congress created the National Park Service, an agency within the Department of the Interior, to administer the national park system.[3] The National Park Service Organic Act, 16 U.S.C. 1 *et seq.*, defines the scope of the authority it confers as follows:

> The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress.

National Park Service Organic Act, ch. 408, § 1, 39 Stat. 535, as amended, 16 U.S.C. 1a-1. The Act provides that the "fundamental purpose of the said parks, monuments, and reservations * * * is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same * * * unimpaired for the enjoyment of future generations." 16 U.S.C. 1 (Supp. III 1997).

Recognizing that the Everglades comprise "a country distinctly different from anything else in all our great country, if not in the entire world," 78 Cong. Rec. 9501 (1934) (statement of Rep. Treadway), Congress in 1934

Experimental Program of Water Deliveries to Everglades National Park, which sets forth detailed operating criteria for the C&SF Project. See *South Dade Land Corp.* v. *Sullivan*, 853 F. Supp. 404, 409-410, 412 (S.D. Fla. 1993) (approving June 1993 EA). The operating criteria provide mandatory schedules and conditions for some structures within the Project.

[3] See *Universal Interpretive Shuttle Corp.* v. *Washington Metro. Area Transit Comm'n*, 393 U.S. 186, 187 n.1 (1968).

"authorized establishment of the Everglades National Park." *Organized Fishermen* v. *Hodel*, 775 F.2d 1544, 1546 (11th Cir. 1985) (citing 16 U.S.C. 410), cert. denied, 476 U.S. 1169 (1986). The Everglades National Park Acts, 16 U.S.C. 410 *et seq.*, provide that the "administration, protection, and development" of the Park shall "be exercised under the direction" of the Secretary of the Interior, through the National Park Service. 16 U.S.C. 410b. The Park Service must administer the Park as a wilderness and "preserv[e] intact * * * the unique flora and fauna and the essential primitive natural conditions now prevailing in this area." 16 U.S.C. 410c.

Under 16 U.S.C. 410b, "nothing in sections 410 to 410c * * * shall be construed to lessen any existing rights of the Seminole Indians which are not in conflict with the purposes for which the * * * Park is created." See 16 U.S.C. 1, 1a-1 (1994 & Supp. III 1997). The Everglades National Park Acts, in 16 U.S.C. 410b, also require the Park Service to administer the Park "subject to the provisions of section[] 1" of the National Park Service Organic Act, 16 U.S.C. 1 *et seq.*, described above.

3. In late August to October 1994, central and south Florida received record levels of rainfall. Pet. App. 16a-17a. In November 1994, Tropical Storm Gordon brought extremely heavy rains to the already-saturated region, resulting in flood conditions in much of central and south Florida. *Id.* at 20a-21a.

Among the areas affected by the heavy rainfall were areas where petitioner Miccosukee Tribe has interests. The United States holds in trust for the Tribe certain reservation lands in the Everglades area north of

Everglades National Park.[4] Also, east of and adjacent to the main reservation lies a 189,000-acre tract of land the Tribe has leased from the State of Florida (the Leased Area). In 1994, the Tribe additionally had the right to use and occupancy of a 333-acre tract of land located within the Everglades National Park pursuant to a special use permit issued by the Park Service (the Permit Area). The special use permit, negotiated in 1964, subjects the area to federal statutes granting discretion to the Park Service to operate the Everglades National Park. Both the Leased Area and much of the Miccosukee Reservation (50,000 acres) are located within a WCA (WCA-3A), which, as described above, is a flood control area where water is impounded. Pet. App. 11a-13a.

The heavy rains and Tropical Storm Gordon affected the Tribe, its lands, and its ability to plant crops and engage in traditional religious ceremonies on its lands. Pet. App. 20a-21a. The heavy rains also caused unusually high water levels within Everglades National Park, which lies immediately south of the Miccosukee Permit Area. *Id.* at 17a, 21a. As part of their flood control responsibilities, the Corps and the SFWMD, the state entity charged with flood control duties, released water from WCA-3A, which exacerbated flooding in the Park. *Id.* at 17a-18a. The water released from WCA-3A flowed downstream into the Park through a series of flood control devices known as the "S-12 structures." *Ibid.*

The flooding had a direct and adverse impact on natural resources in the Park. The high water levels and attendant circumstances killed white-tailed deer

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[4] No members of the Tribe live on the reservation lands. Pet. App. 11a.

and other wildlife in the Park and disturbed reproductive cycles and predator-prey dynamics of endangered and other wildlife species such as the Florida Panther, Cape Sable Seaside Sparrow, and the American Alligator. Pet. App. 21a-22a; R. 45, attachs. 5-7.

The heavy rains and flood water releases also had a severe impact on the physical infrastructure and operations at the Park. Six to twenty inches of water covered the entrance, parking lot, and other parts of the Shark Valley visitor area (located just to the east of the Tribe's Permit Area). Pet. App. 17a. In fact, before Tropical Storm Gordon, the heavy rainfall required the Park Service to close the Shark Valley visitor area for several days, and after the Tropical Storm, Shark Valley was closed until February 1995. *Id.* at 17a, 21a.

4. During the flooding, representatives of the Park Service, the Corps of Engineers, and SFWMD conferred with the Tribe regarding how best to address flood-related problems affecting the Tribe. The agencies implemented or approved numerous measures intended to provide flood relief for the Tribe, particularly within the Permit Area, which houses the Tribe's offices and residences for most of its members. Pet. App. 19a-20a, 22a-25a. Two of the Tribe's numerous flood control requests, however, were not approved.

First, the Tribe requested that flood control structure S-333 (located in the southeast corner of WCA-3A) be opened to discharge water from WCA-3A to the east. The Corps and SFWMD refused to open the structure due to strict regulations permitting the structure to be opened only if certain prescribed water levels existed in canals and monitoring wells. Pet. App. 18a, 23a.

Second, the Tribe requested the removal of certain vegetation located south of the S-12 structures within

the Everglades National Park. The Tribe believed that removing the vegetation would accelerate the flow of water through the structures out of WCA-3A. After much consideration and discussion with the Tribe, however, the Park Service eventually refused to approve the cutting of the vegetation for several reasons.[5] Park Service officials were concerned that removing the vegetation would adversely affect water quality and destroy natural vegetation in the Park by releasing undesirable nutrients into the water column, which flows south into the Park. Pet. App. 19a, 25a. In addition, Park Service officials feared that even if removing the vegetation would increase flows through the S-12 structures, that increase would necessarily increase the total flow into the Park and aggravate existing damage to the Park's natural resources and infrastructure. *Id.* at 25a. And because prior experimentation with vegetation removal elsewhere in the Park had resulted in no noticeable flow increases over time but had greatly increased the volume of sediment, pollutants, and plant debris flowing into the Park, the Park Service concluded that the speculative benefit of the proposal would not be worth the resultant damage to the Park stemming from its implementation. *Ibid.*[6]

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[5] The Corps, without weighing issues of water quality, wildlife impacts, or the health of the Everglades ecosystem, had indicated that it believed removal of the vegetation should technically increase water flow through the structures. Pet. App. 18a-19a, 23a. As discussed below, however, the Park Service, after considering the impact of the proposed action on water quality, wildlife, and the ecology of the area, and balancing the needs of the Everglades National Park, concluded that the Tribe's proposal would be inappropriate and, perhaps, ineffective.

[6] The agencies' efforts to reduce flooding in the Miccosukee's Permit Area, however, were largely successful. In November and

5. On March 16, 1995, petitioners filed suit against officials of the Park Service, the Corps of Engineers, and the SFWMD seeking declaratory and injunctive relief to compel the agencies to relieve flooding conditions on its lands.[7] Petitioners alleged violations of the Due Process Clauses of the Fifth and Fourteenth Amendments and of the Equal Protection Clause, as well as violations of trust duties owed by the federal defendants. With their complaint, petitioners filed an emergency motion for a preliminary injunction seeking removal of the vegetation behind the S-12 structures. Pet. App. 61a-74a.

After a hearing, the district court denied the motion for a preliminary injunction. Pet. App. 8a. Petitioners did not appeal that ruling, nor did they move to establish a discovery schedule or file any document requests or interrogatories.

Nearly two months after the denial of the preliminary injunction, the federal respondents and the SFWMD moved for summary judgment. On June 16, 1995, petitioners moved, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, to foreclose entry of summary judgment based upon an allegedly inadequate

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December 1994, Park personnel observed no more than six to eight inches of water on driveway aprons at the west end of the Permit Area and even lower water levels over portions of interior roads in the area. Although some of the Tribe's businesses had shallow standing water, residences were three to four feet above high-water levels. R. 45, attach. 4, ¶ 6.

[7] Petitioners originally asserted a *Bivens* claim seeking damages against Everglades National Park Superintendent Richard G. Ring and Special Assistant to the Assistant Secretary of the Interior for Fish and Wildlife, Barbara J. West, in their individual capacities. Petitioners subsequently agreed to a voluntary dismissal of that claim. Pet. App. 8a.

opportunity to conduct discovery. R. 65.[8] With that motion, petitioners included one affidavit, document production requests, and interrogatories. Petitioners filed six additional affidavits with their opposition to respondents' summary judgment motions and their own cross-motion for summary judgment. In response, the respondents opposed the Rule 56(f) motion and moved for protective orders staying discovery. R. 81, 85.

In an order entered on August 21, the district court denied petitioners' Rule 56(f) motion to foreclose entry of summary judgment. Order on Motion Under Rule 56(f) and Motions for Protective Orders (Rule 56(f) Order). The district court recognized that Rule 56(f) allows a party to survive a summary judgment motion if it "presents valid reasons justifying his failure of proof." *Id.* at 3 (quoting *Barfield* v. *Brierton*, 883 F.2d 923, 931 (11th Cir. 1989) (quotation marks omitted)). Following well-settled Eleventh Circuit precedent, however, the court held that petitioners had failed to carry their burden to present an affidavit that contains specific facts and explains how deferring disposition by summary judgment would allow them, through discovery or other means, to rebut the respondents' showing that no material facts were in dispute. *Ibid.* After examining the matters petitioners alleged they could produce through discovery, the court explained that "a careful review of the list reveals that many of

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[8] Although Federal Rule of Civil Procedure 56(b) permits a defending party to move "at any time" for summary judgment, Rule 56(f) provides that "[s]hould it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had."

the entries relate to legal issues or factual matters that are not in dispute." *Id.* at 4.

Addressing petitioners' claim that discovery could show purposeful discrimination, the court found that the requested discovery might "make the Tribe aware of more meetings and documents" but that the Tribe had not shown how that information would enable it to show discrimination. Rule 56(f) Order, *supra*, at 5. Noting that an affidavit submitted by the Tribe merely alleged that respondents had meetings to which the Tribe was not invited, and that documents relating to those meetings would show purposeful discrimination, the court held that that "vague assertion" was "no more than speculation regarding the existence of probative evidence" and was insufficient to meet the burden of showing specific facts. *Id.* at 5-6. The court therefore denied petitioners' Rule 56(f) motion, finding that the extensive record generated during the preliminary injunction stage was "more than sufficient" to resolve the issues raised on summary judgment. The court also stayed discovery until it ruled on the summary judgment motions.

In July 1997, after the district court scheduled a hearing on the summary judgment motions and almost two years after the court denied petitioners' Rule 56(f) motion, petitioners moved to lift the stay of discovery and filed one supplemental affidavit on the issue of the SFWMD's Eleventh Amendment immunity. On August 1, 1997, the district court granted summary judgment in favor of the federal defendants and the SFWMD.[9] Pet. App. 7a- 46a.

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[9] At the hearing on the summary judgment motions, petitioners renewed their Rule 56(f) motion. With respect to that renewal, the district court ruled (Pet. App. 9a n.1) that petitioners "did not state

6. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-6a. The court of appeals held that the federal respondents had not violated their general duty of trust to the Tribe and that none of the applicable statutes, regulations, or agreements gave rise to any specific duties requiring the flood control measures requested by the Tribe. *Id.* at 2a-3a (comparing *United States* v. *Mitchell*, 463 U.S. 206, 224-228 (1983), with *Vigil* v. *Andrus*, 667 F.2d 931, 934 (10th Cir. 1982)). The court of appeals further held that petitioners failed to raise a genuine issue of material fact as to its due process and equal protection claims against the federal respondents. Pet. App. 3a. Noting that to prove their various constitutional claims petitioners were required to present proof of discriminatory intent, that there is a special relationship giving rise to a governmental duty of care, and that governmental action that impinged upon the Tribe's exercise of religion was not neutral or generally applicable, the court held that in their affidavits petitioners did "not allege[] any specific, nonconclusory facts that would enable [them] to prove these claims." *Id.* at 4a.

Finally, the court of appeals rejected petitioners' challenge to the district court's denial of their Rule 56(f) motion to defer consideration of the motions for summary judgment. Pet. App. 6a. The court held that petitioners "ha[ve] not demonstrated how further discovery would 'enable [them] * * * to rebut [respondents'] showing of the absence of a genuine issue of fact.'" *Ibid.* (quoting *SEC* v. *Spence & Green Chem. Co.*, 612 F.2d 896, 901 (5th Cir. 1980), cert.

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what specific facts [they] expected further discovery to produce" and held that petitioners failed to meet their burden to show that any genuine issues of material fact remained.

denied, 449 U.S. 1082 (1981)). Based on that failure, the court held that the district court did not abuse its discretion in denying petitioners' Rule 56(f) motion and staying discovery pending disposition of respondents' summary judgment motions. *Ibid.*[10]

ARGUMENT

Petitioners contend (Pet. 11-20) that the court of appeals erred in affirming the district court's denial of their Rule 56(f) motion to foreclose summary judgment and its grant of summary judgment in favor of the federal respondents without permitting discovery. Petitioners also contend (Pet. 20-22) that the Eleventh Circuit erred by failing to remand the case to permit petitioners to amend their complaint. Contrary to petitioners' contentions, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Petitioners argue (Pet. 11) that the court of appeals' decision conflicts with this Court's decision in *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 323 (1986), which petitioners erroneously characterize as holding (Pet. 11, 17) that parties are invariably entitled to discovery before entry of summary judgment. *Celotex* does not so hold. Rather, *Celotex* sets forth the criteria for summary judgment, instructing that it may be granted where the moving party shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"; to meet that burden, the moving party need not

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[10] The court of appeals also held that petitioners failed to raise a genuine issue of material fact with respect to their claims against the SFWMD. Pet. App. 4a-5a.

support its motion with affidavits or other materials negating its opponent's claims. 477 U.S. at 322-323. This Court also noted that problems relating to premature motions for summary judgment may be adequately dealt with under Rule 56(f) of the Federal Rules of Civil Procedure. 477 U.S. at 326 n.6. Here, the court of appeals held that the district court acted within its discretion in denying petitioners' Rule 56(f) motion because the affidavit supporting that motion wholly failed to explain what material facts further discovery would enable them to prove and why further discovery was necessary. That disposition in no way conflicts with *Celotex*.[11]

Moreover, the courts below followed well-settled Eleventh Circuit precedent, which requires that a party seeking relief under Rule 56(f) must "present an affidavit containing specific facts explaining his failure to respond to the adverse party's motion for summary judgment via counter affidavits establishing genuine issues of material fact for trial," and "must show the court how the stay will operate to permit him to rebut, through discovery, the movant's contentions." See *Barfield* v. *Brierton*, 883 F.2d 923, 931 (11th Cir. 1989). Because petitioners' affidavit supporting their Rule

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[11] Petitioners cite two previous Eleventh Circuit cases for the proposition that a party is entitled to "adequate discovery" before summary judgment may be granted against it. See Pet. 11 (citing *Jones* v. *City of Columbus*, 120 F.3d 248 (1997), cert. denied, 523 U.S. 1118 (1998), and *WSB-TV* v. *Lee*, 842 F.2d 1266, 1269 (1988)). Those decisions merely stand for the proposition that, before summary judgment may be entered, the record before the court must be adequate. In this case, the district court expressly held that the record before it—which included extensive briefing, affidavits, and exhibits from the preliminary injunction stage—was ample for deciding the motions for summary judgment.

56(f) motion failed to itemize any specific facts that additional discovery would produce and instead included only "vague assertions that additional discovery will produce needed, but unspecified, facts," *ibid.*, the Rule 56(f) motion was properly denied and petitioners were not subject to an unjustified pre-discovery burden.[12] See *SEC* v. *Spence & Green Chem. Co.*, 612 F.2d 896, 900 (5th Cir. 1980), cert. denied, 449 U.S. 1082 (1981).

2. Petitioners assert (Pet. 12-14) that the court of appeals improperly relied upon this Court's recent decision in *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), to impose a higher burden of specificity in pleading constitutional claims. See Pet. 12 (citing Pet. App. 6a); Pet. 17. The court of appeals stated:

> Finally, concerning the Rule 56(f) issue, the Tribe has not demonstrated how further discovery would "enable [it] . . . to rebut the [defendants'] showing of the absence of a genuine issue of fact." *SEC v. Spencer & Green Chemical Co.*, 612 F.2d 896, 901 (5th Cir. 1980) * * * (quoting *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975)) (internal quotation marks omitted). The district court therefore did not abuse its discretion in denying the Tribe's rule 56(f) motion and staying discovery pending disposition of the defendants' summary judgment motions. *See Jones*

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[12] As in the district court and in the court of appeals, petitioners' account (Pet. 17-19) of the substance of the affidavits they submitted to the district court merely shows that they sought discovery on issues that were not disputed and/or were not material to their claims, and that they failed entirely to show how the requested discovery would enable them to show a genuine issue of material fact. See Pet. App. 9a n.1 (citing cases).

> *v. City of Columbus*, 120 F.3d 248, 251 (11th Cir. 1997) (abuse of discretion review for discovery decisions generally); *Barfield v. Brierton*, 883 F.2d 923, 931 (11th Cir. 1989) (abuse of discretion review for rule 56(f) decisions); *see generally Crawford-El*, 118 S. Ct. at 1596-97 (quoting *Siegert v. Gilley*, 500 U.S. at 236 (A district court "may insist that the plaintiff put forward specific, nonconclusory factual allegations[] that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.").

Pet. App. 6a.

Petitioners err in claiming that the Eleventh Circuit utilized a brief citation in an unpublished opinion to alter the generally accepted standards governing when summary judgment may be granted on a constitutional claim. As the excerpt quoted above makes clear, the court of appeals cited *Crawford-El* for the proposition that where a party has moved pursuant to Rule 56(f) to stay a ruling on a motion for summary judgment and fails to demonstrate how further discovery would rebut the moving party's showing of the absence of a genuine issue of fact, a district court's denial of such motion is not an abuse of discretion. See also *Crawford-El*, 523 U.S. at 598-600 (discussing discretion and tools available to district courts for managing, tailoring, and/or barring discovery).[13]

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[13] Petitioners chide the court of appeals for citing this Court's decisions in *Washington* v. *Davis*, 426 U.S. 229, 240 (1976); *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189, 197-200 (1989); and *Church of Lukumi Babalu-Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531-546 (1993), because, according to petitioners, those cases "did not involve pre-discovery summary judgment." Pet. 14-15. The court of appeals cited those

3. Finally, petitioners argue (Pet. 20-22) that the court of appeals erred in "retroactively" applying this Court's decision in *Crawford-El* to their claims without permitting them to return to district court to amend their complaint. As discussed above, however, the court of appeals addressed the district court's denial of petitioners' Rule 56(f) motion under well-settled Eleventh Circuit precedent. Indeed, in the passage in *Crawford-El* that the court of appeals cited, the Court noted that it was recounting "the *existing* procedures available to federal trial judges." 523 U.S. at 597 (emphasis added). The court of appeals' application of settled law regarding summary judgment practice to petitioners' claims did not deny petitioners "fundamental fairness, procedural due process and equity." Pet. 20.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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cases, however, to illustrate the necessary elements of an equal protection or due process claim, not as support for any principle regarding summary judgment practice. See Pet. App. 3a-4a.

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No. 98-1692

IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,
a federally-recognized Indian Tribe
and BILLY CYPRESS,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

RESPONDENTS FAILED TO REBUT THE TRIBE'S ARGUMENT THAT THE GRANT OF SUMMARY JUDGMENT PRIOR TO ANY DISCOVERY WAS CONTRARY TO SUPREME COURT AND APPELLATE PRECEDENT AND THAT, AT A MINIMUM, THE TRIBE SHOULD HAVE BEEN PERMITTED TO AMEND ITS COMPLAINT.

The Tribe disagrees with the general self-serving conclusions in Respondents' statement of facts. For example, the South Florida Water Management District ("SFWMD") asserts that it took all possible steps to alleviate flooding in Tribal lands (SFWMD Brief at 7-11). However, despite months of discussions with defendants, aimed at alleviating conditions in Tribal lands, and despite admissions that vegetation removal would alleviate flooding, defendants knowingly kept the Tribe's lands flooded. (*See* Pet. at 10).

Respondents incorrectly argue that summary judgment was proper here because the record was adequate and included "extensive briefing, affidavits, and exhibits form the preliminary injunction stage" (Brief of Federal Respondents at 15 n.11). The record in this case was completely inadequate because the Tribe was never afforded the opportunity to conduct *any* discovery. (*See* Pet. App. 55a). The Motions for Summary Judgement were filed within less than two months of the hearings for preliminary injunction and, in fact, Federal Respondents Answered the Complaint at the same time they filed for summary judgment on May 15, 1995 (R-2:41, 42, 43, 51-55). Approximately thirty days thereafter, the Tribe filed its Fed. R. Civ. P. 56(f) Motion (R2:65) and also filed its requests for discovery. The Respondents then filed their Motions for a Protective Order (R2:81, 88). Thus, this is not a case where the Tribe neglected to timely request discovery. Within four months

of the filing of the Complaint, the district court denied the Tribe's Rule 56(f) motion and stayed discovery until the district court ruled on the pending motions for summary judgment and the SFWMD's Motion to Dismiss. (R3:97).

Respondents' argument (*see* Respondent SFWMD's Brief at 13 and Federal Respondents' brief at 16) that additional discovery was not appropriate, and/or that the Tribe failed to pursue discovery, on the face of this record, lacks any merit.

Respondents fail to adequately address the difference between prediscovery summary judgment granted by the district court here, and upheld by the Eleventh Circuit, and cases such as *Celotex v. Catrett*, 477 U.S. 317, 323 (1986), where there had been substantial discovery. The district court did not permit the Tribe even the most basic right to discovery, as required by the Supreme Court in *Celotex, supra*, and by appellate precedent of the Eleventh Circuit, as well as other Circuit Courts of Appeal. *See, e.g., Jones v. City of Columbus*, 120 F.3d 248 (11th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1797 (1998); *WSB-TV v. Lee*, 842 F.2d 1266, 1269 (11th Cir. 1988); *Miller v. United States* 710 F.2d 656, 666 (10th Cir), *cert. denied*, 464 U.S. 939 (1983); *National Life Ins. Co. v. Solomon*, 529 F.2d 59 (2nd Cir. 1975). In this case the Tribe was forced to file a premature Rule 56(f) motion in an attempt to survive prediscovery summary judgment. Further, the Tribe was not permitted to amend its Complaint. The posture of the case at bar is distinguishable from that in *Celotex*, where the summary judgment motion was filed a year after commencement of the action, upon completion of discovery by the non-movant. *Celotex, supra*, 477 U.S. at 326.

Furthermore, the Respondents have failed to adequately address the Tribe's arguments that even without discovery, disputed material issues of fact were presented in the Tribe's

Rule 56(f) Motion and attached affidavits, which also showed that the Tribe was entitled to discovery. For example, in granting summary judgment, the district court found that "federal defendants have produced evidence showing non-discriminatory reasons for denying the Tribe's request." (Pet. App. 45a). The district court further found that "[t]he Tribe has not shown that these reasons were a pretext for discrimination" (Pet. App. 45a). However, the Tribe was not permitted any discovery to rebut the material disputed issues of fact relied upon by district court. Moreover, there were numerous disputed issues of fact which, even without discovery, the Tribe was able to dispute by affidavits in its motion under Fed. R. Civ. P. 56(f). (*See* Tribe's Petition for Writ of Certiorari at 17-19). In fact, Federal Respondents' own Response brief shows that there are disputed issues of fact. The Response refers to decisions by various federal agencies and the alleged reasons for the decisions. (Respondents' brief at 9-10 and n.5 and n.6). The Respondents' brief concludes that the federal defendants' decisions were proper, and balanced the "needs" of Everglades National Park. *Id.* Federal Respondents are not entitled to the factual conclusion that they did not discriminate against the Tribe or violate constitutional rights without ever allowing the Tribe the opportunity to even begin to prove its case. Unlike the case of *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988), where there was evidence that the government had attempted to minimize impact on religious practices, here, the Tribe was never allowed discovery to show that the government did nothing to protect it. *Id.* at 454; *see also* remarks of Barbara West (Pet. at 9).

Federal Respondents' argument that the Eleventh Circuit did not alter generally accepted standards governing summary judgment when it relied upon this Court's decision of *Crawford -El v. Britton*, 523 U.S. 574, __, 118 S. Ct. 1534, 1596-97 (1998) is simply incorrect. A review of the Eleventh Circuit's opinion

shows that the Eleventh Circuit not only ignored the posture of the case, which was prediscovery summary judgment, but it also erroneously decided the case based on a standard not applicable to this case by relying on the decision of *Crawford-El*, and particularly by citing to specific pages of that decision:

> The Tribe has not alleged any specific, claims. See Fed. R. Civ. P. 56(e) (Summary judgment a genuine issue for trial."); *Crawford-El v. Britton*, 118 S.Ct 1584, 1596-97 (1998) (quoting Siegert v. Gilley, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)) ("[T]he court may insist that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment.").

Pet. App. at 4a.

As the Tribe correctly noted in its Petition, in relying on *Crawford-El* to support its holding, the Eleventh Circuit Court of Appeal relied on the portion of the *Crawford-El* decision where this Court explained existing procedures available to judges in handling claims of improper motive. Thus, the Eleventh Circuit incorrectly relied upon the portion of the *Crawford-El* opinion involving individual capacity suits, *Crawford-El v. Britton*, *supra*, 523 U.S. 574, __, 118 S. Ct. at 1596-97, to uphold the district court's grant of Respondents' prediscovery summary judgment motions. However, in this case, the individual capacity claims had been previously dismissed. There is confusion following the decision in *Crawford-El* regarding the applicable standard. *See, e.g., Ross v. State of Alabama*, 15 F. Supp. 2d 1173, 1191 n.10 (S.D. Ala. 1998).

Nor do Respondents adequately address the Tribe's argument that even if *Crawford-El* had changed the pleading requirements for cases such as the one at bar, at a minimum, the Tribe should have been permitted to amend its Complaint. *See, e.g.*, Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Thomas v. Town of Dane*, 847 F.2d 771, 773 (11th Cir. 1988). Federal Respondents merely refer to the *Crawford-El* passage cited by the Eleventh Circuit which, as stated above, explained procedures available to judges in handling claims of improper motive in individual capacity suits and then argue that in *Crawford-El* the Supreme Court was recounting the existing procedures available to federal judges. However, those procedures which the Supreme Court "recounted" in the cited portion involved individual capacity claims; this case did not involve individual capacity claims as those claims were dismissed by the Tribe. The SFWMD also argues, in its Response (SFWMD's Brief at 12 n.10), that the Eleventh Circuit did not err when it relied on *Crawford-El*. However, neither the SFWMD nor Federal Respondents explain how the Eleventh Circuit could have properly relied on the portion of the *Crawford-El* decision discussing procedures for individual capacity cases. The SFWMD argues that the Tribe should not get "another bite at the apple" (SFWMD Response at 12 n.10). However, the Tribe is not asking for another bite at the apple. The Tribe merely requests the first bite . . . one to which it is entitled under Supreme Court as well as appellate precedent.

CONCLUSION

For the reasons stated herein and in the Tribe's Petition for Writ of Certiorari the Tribe respectfully requests that this Court grant certiorari review.

Respectfully submitted,

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